The Laws of the Saint King

Aspects of Political and Legal Culture in Norway

from the Eleventh Century to the End of Hákon Hákonarson's Reign

A Master's Thesis in Nordic Viking and Medieval Culture

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Contents

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Abbreviations

Ágrip	*Ágrip af Nóregskonunga sögum*. Ed. Bjarni Einarsson. Íslenzk fornrit. Vol. 29. Reykjavik: Hið Íslenzka fornritafélag, 1985. Pp. 1–54
Dipl Norv	*Diplomatarium Norvegicum: Oldbreve til Kundskab om Norges indre og ydre Forhold, Sprog, Slægter, Sæder, Lovgivning og Rettergang i Middelalderen*. Ed. Chr. C. A. Lange *et al*. 22 vols. to date. Christiania / Oslo: [imprint varies], 1847–
Fsk	*Fagrskinna – Nóregs konunga tal*. Ed. Bjarni Einarsson. Íslenzk fornrit. Vol. 29. Rekjavik: Hið Íslenzka fornritafélag, 1985. Pp. 55–373
F	*Den ældre Frostatings-Loven*. Ed. R. Keyser and P. A. Munch in NgL 1: 1–118; NgL 2: 495–500; ed. Gustav Storm in NgL 4: 19–50; NgL 5: 1–7
Grg. 1	*Grágás: Islændernes Lovbog i Fristatens Tid*. Ed. and transl. Vilhjálmur Finsen. 4 vols. Nordiske Oldskrifter. Vols. 11, 17, 21–22, 32. Copenhagen: Det nordiske Literatur-Samfund, 1852–70. The first two volumes are cited as 1 a and 1 b respectively
Grg. 2	*Grágás efter det Arnamagnæanske Haandskrift, 334 fol., Staðarhólsbók*. Ed. Vilhjálmur Finsen. Copenhagen: Gyldendal, 1879
Grg. 3	*Grágás. Stykker, som findes i det Arnamagnæanske Haandskrift, nr. 351 fol. Skalholtsbok og en Række andre Haandskrifter*. Ed. Vilhjálmur Finsen. Copenhagen: Gyldendal, 1883
G	*Den ældre Gulatings-Loven*. Ed. R. Keyser and P. A. Munch in NgL 1: 119–258; NgL 2: 500–22. Ed. Gustav Storm in NgL 4: 3–19
Hkr	Snorri Sturluson, *Heimskringla*. Ed. Bjarni Aðalbjarnarson. 3 vols. Íslenzk fornrit. Vols. 26–28. Reykjavik: Hið Íslenzka bókmenntafélag, 1941–51
Hkr (Hákgóð)	*Hákonar saga góða*
Hkr (HSig)	*Haralds saga Sigurðarsonar*
Hkr (Mgóð)	*Magnúss saga góða*
Hkr (Ólhelg)	*Óláfs saga helga*
Hkr (Msona)	*Magnússona saga*

HRG	*Handwörterbuch zur deutschen Rechtsgeschichte*. Ed. Adalbert Erler *et al*. 5 vols. Berlin: Schmidt, 1971–98
HT	*Historisk Tidsskrift utgitt av Den norske historiske forening*
MHN	*Monumenta historica Norvegiae: Latinske Kildeskrifter til Norges Historie i Middelalderen*. Ed. Gustav Storm. Kristiania: Brøgger, 1880
NgL	*Norges gamle Love indtil 1387*. Ed. Rudolf Keyser *et al*. 5 vols. Christiania: Grøndahl, 1846–95
Msk	*Morkinskinna*. Ed. Finnur Jónsson. Samfund til Udgivelse af Gammel Nordisk Litteratur. Vol. 53. Copenhagen: Jørgensen, 1932
Ólhelg (Leg)	*Óláfs saga hins helga. Efter pergamenthaandskrift i Uppsala Universitetsbibliotek, Delagardieske samling nr. 8 II*. Ed. Oscar Albert Johnsen. Kristiania: Dybwad, 1922
Ólhelg (Sep)	*Saga Óláfs konungs hins helga. Den store saga om Olav den hellige efter pergamenthåndskrift i Kungliga biblioteket i Stockholm Nr. 2 4to*. Ed. Oscar Albert Johnsen and Jón Helgason. 2 vols. Oslo: Dybwad, 1941
RGA	*Reallexikon der germanischen Altertumskunde*. 2nd rev. ed. Ed. Heinrich Beck. 22 vols. to date. Berlin: de Gruyter, 1973–
Skjd.	*Den norsk-islandske skjaldedigtning*. Ed. Finnur Jónsson. 2 vols. in 4. Copenhagen: Gyldendal, 1912-1915
ZRG GA	*Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Germanistische Abteilung*

Introduction

In this study an attempt is made to trace the history of one particularly pervasive and influential theme in political and legal thought of twelfth- and thirteenth century Norway: the association of the laws with the name of St Óláfr, the patron of the realm and of the royal family. It manifests itself in different guises in the liturgical commemoration of the saint king, in the tradition of secular history-writing, in the books of laws, and in the rituals of the kingship. On closer inspection, we may discern a number of individual motifs that, being inextricably interwoven with one another, constitute this theme when it reaches the peak of its development:

a) a belief that during the years of his reign, King Óláfr promulgated laws that embodied justice and equity;

b) these laws were committed to writing, at least in part, either by the saint king himself or by the posterity, and may presently be found in an ancient law-book;

c) Óláfr's legislation is still the Norwegian kingdom's valid law;

d) the rulers and the subjects alike are bound by these laws;

e) these laws, however, may fall for a while into oblivion or disregard, and it becomes necessary then to restore them.

This theme was by no means unique to Norway. Other political communities of the medieval West vested their identity in legendary laws of great rulers of the past. Parallels between the symbolical function of such notions as *lög hins helga Óláfs* in Norway, *laga Eadwardi* in Norman and Angevin England, and *Karls recht* in the Empire have long attracted the attention of scholars. They have voiced widely differing opinions as to the origin and significance of this phenomenon. It has been suggested, on the one hand, that the image of a legendary lawgiver was but a particular manifestation of a specific conception of law inherent in the popular mind, a conception in which there was no room for distinction between positive and ideal law, between law and morals, and the validity of all law essentially depended on its age and goodness. On the other hand, it has been argued that the figure of a legendary lawgiver

was engineered by the church and subsequently utilized by the royal power, which legitimized its growing ambitions by an appeal to his laws.

The present study of the phenomenon of a legendary lawgiver taking its point of departure in the Norwegian material, is intended as a contribution to this ongoing debate. Certain aspects of the problem seem to call for further examination. A number of questions are connected with the genesis of the notion of the "laws of St Óláfr": What was the relation between contemporary reactions to King Óláfr Haraldsson's lawmaking and the subsequent growth of the legend? When did his reign become a reference point with which usages and customs of the day were compared and judged? How early did the tendency manifest itself to indiscriminately attribute all old-established law to Óláfr? How significant was the impact of the intellectual tradition of the learned law on the formation of this notion? Another group of questions concern the significance of the theme: How did the notion of the "laws of St Oláfr" function in political and legal life of medieval Norway? Which part did they play in conflicts between individuals or social groups? How was it utilized in legitimizing all sorts of claims? Finally, it is necessary to attempt to situate the notion of the "laws of St Óláfr" in the broader context of the contemporary attitudes towards law and legislation generally.

As we can see, the questions regarding the topic are numerous, but it will not be sufficient to limit the investigation to explicating the empirical material. It is also necessary provide an analysis of divergent approaches to the phenomenon of a legendary lawgiver and to the medieval conceptions of law generally in order to understand which areas regarding this topic particularly are in need of further research and acquaint the reader with the conceptual framework within which our investigation will be conducted. Additionally, a comprehensive discussion spanning the history of the debate will hopefully illuminate areas of mutual misunderstanding and provide a basis for a more fruitful dialogue in the future.

A few words are in order concerning the plan for this study. It opens with the survey of previous scholarship (chapter 1), followed by two chapters discussing the development of the notion of the "laws of St Óláfr" from the eleventh century to the end of King Hákon Hákonarson's reign. One of them focuses on the question of the origins of the notion. The continuity between Óláfr's image among his contemporaries and the subsequent hagiographical tradition is discussed on the example of Sighvatr Þórðarson's verse. The following section provides an analysis of references to the legal status as it was in the "days of King Óláfr the Saint" in *Frostuþingsbók*. Further, the *réttarbót* of kings Haraldr and Magnús stipulating that the "laws of St Óláfr" are to be maintained comes under scrutiny. Finally, an attempt is made to interpret the meaning of the division into the "Óláfr" text and the

"Magnús" text in the revised version of *Gulaþingsbók* dating from the reign of King Magnús Erlingsson.

The other chapter is concerned with the history of the motif in the century between 1160s and 1260s. In the opening section we discuss the picture of St Óláfr's legislation painted in the ecclesiastical literature about the saint king and the impact on it of the contemporary juristic theories. The two following section investigate the role which an appeal to the "laws of St Ólafr" played in legitimizing claims to the throne in *Sverris saga* and *Hákonar saga Hákonarsonar*. The chapter closes with an analysis of the motif of "renovation" of the saint king's law in the legislation of the late years of King Hákon's reign.

CHAPTER 1

The "Good Old Law"

Fritz Kern, His Follows, and His Critics

The German historian Fritz Kern (1884-1950) was probably the first to bring the figure of a legendary legislator into full prominence in the discussion of medieval legal thought. In the picture of the medieval idea of law that he painted, the laws of a "mythological lawgiver" as he termed this personage typified the essential difference in values and attitudes between that epoch and our own time. The theories that Kern put forward early in the twentieth century are still influential in the study of the subject, and it is necessary to discuss them in some detail.

Kern's field was what in German tradition is called "constitutional history" (*Verfassungsgeschichte*), the study of the society mainly from the angle of the public authority and institutions,[1] and it was in an attempt to elucidate a complex problem in the history of the medieval "constitution" (*Verfassung*) that he first developed his views on the specific nature of the medieval law. In his book *Gottesgnadentum und Widerstansrecht im früheren Mittelalter* (1914) Kern gave a penetrating analysis of two seemingly contradictory trends in medieval political thought: exaltation of the king's power, based on the hereditary title and ecclesiastical consecration, on the one hand, and assertion of the subjects' right, under certain circumstances, to resist and ultimately overthrow the monarch, on the other.[2] According to Kern, the paradox was resolved through the fundamental principle of the king's limitation by the laws, a principle that was inherent in both the doctrine of the church and the Germanic tradition, although with some significant difference of accent.[3] While the ecclesiastical teaching laid stress on the monarch's subordination to ideal law, the law of nature and the divine law,[4] in the Germanic thought the limitation rested on another understanding of law, which Kern tried to elucidate. Already in *Gottesgnadentum und*

[1] František Graus, "Verfassungsgeschichte des Mittelalters," *Historische Zeitschrift* 243 (1983) 543–46, is a particularly lucid statement of the distinctive character of this branch of German-speaking historiography.
[2] Fritz Kern, *Gottesgnadentum und Widerstandsrecht im früheren Mittelalter*, Mittelalterliche Studien, vol. 1, pt. 2 (Leipzig: Koehler, 1914). The book was translated by S. B. Chrimes in Fritz Kern, *Kingship and Law in the Middle Ages*, Studies in Mediaeval History, vol. 4 (Oxford: Blackwell, 1939), pp. 1–146, with omission of almost all the numerous footnotes and appendixes.
[3] Kern, *Gottesgndentum*, pp. vi, 142, 146-47.
[4] Kern, *Gottesgndentum*, pp. 143-45, 147, 310.

Widerstandsrecht he indicated what its distinctive character consisted in, but it was only a few years later, in his article "Recht und Verfassung im Mittelalter" (1919), that Kern's views on the matter assumed their final shape.[5]

The idea of law, which he set out to elucidate here, was the one of popular belief. He took little interest in reconstructing "primal Germanic" legal thought, not affected with the "taint" of Christianity; "Germanic", in Kern's usage, seems to be primarily opposed to Roman legal culture, re-discovered in the High Middle Ages and expounded by learned jurisprudence.[6] Kern's "Germanic law" is a product of an essentially oral culture and the transition to legal practices based on written record eroded ultimately its identity. In other words, Kern was chiefly concerned with legal conceptions that dominated in the earlier part of the Middle Ages, although as he pointed out, similar notions survived in the "naïve perception" well into modern times.[7]

Indicating the theme central to the entire argument of "Recht und Verfassung", Kern contrasted the medievals' understanding of law to legal positivism dominating the jurisprudence of his own day. "For us law needs only one attribute in order to give it validity; it must, directly or indirectly, be sanctioned by the State. Mediaeval law could dispense with the sanction of the State but not with the two qualities of Age and Goodness… If law were not old and good law, it was not law at all, even though it were formally enacted by the State."[8]

In brief, Kern's theory may be summarized as follows: For law to be law, it had to be "good", "just", and "reasonable". Its other attribute, its age, was a necessary implication of its goodness: "What is equitable must somehow be traceable back to the eternal order of things. The old law is reasonable, and reasonable law is old."[9] It is understandable, therefore, that the mere passing-away of years by itself could not create or reveal law. In a sense, the "good old law" was timeless, and "when law [was] called 'old', it [was] rather a description of its high

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[5] Fritz Kern, "Recht und Verfassung im Mittelalter," *Historische Zeitschrift* 120 (1919) 1-79, translated by S. B. Chrimes in Fritz Kern, *Kingship and Law*, pp. 147–205, without the important Introduction and a part of the footnotes.

[6] Kern, "Recht und Verfassung," pp. 1, 5, 7, 26.

[7] Kern, "Recht und Verfassung," pp. 16, 18, 27–31, 32, 41, 43, 77–79.

[8] See Kern, "Recht und Verfassung," p. 3; *Kingship and Law*, p. 149. For other examples of setting in opposition medieval law and the positivist theory see "Recht und Verfassung," pp. 9–12, 13, 16 42–43. On Kern's thesis as a reaction to positivism and on some points of similarity between the picture of medieval law in "Recht und Verfassung" and the views voiced in the same years by the opponents of the positivist doctrine (*Freirechtsschule*) see particularly the penetrating remarks of Gerhard Theuerkauf, *Lex, Speculum, Compendium Iuris: Rechtsaufzeichnung und Rechtsbewußtsein in Norddeutschland vom 8. bis zum 16. Jahrhundert*, Forschungen zur deutschen Rechtsgeschichte, vol. 6 (Cologne and Graz: Böhlau, 1968), pp. 23–26: "Das Gegenbild, das Fritz Kern zum mittelalterlichen Rechtsbewußtsein entworfen hat, ist der Gesetzpositivismus, also eine extreme Rechtsauffassung. Dem extremen Gegenbild entspricht ein extremes Bild der mittelalterlichen Rechtsanschauung."

[9] Kern, "Recht und Verfassung," p. 6; *Kingship and Law*, p. 152.

quality than a strict determination of its age."[10] Old law broke new law because only old law *was* law. The ultimate source of law was God. Men could neither create nor abolish law; they could only "discover" it, or conversely, obscure and violate it. All legislation and legal reform were only permissible as the restoration of the "good old law" that had fallen into oblivion or abuse. Law itself remained unchangeable.[11] Having no date of enactment and no date of repeal, the "good old law" simply existed. It resided in the legal conscience of the community. Consequently, knowing it required neither special training nor law-books.

In Kern's opinion, the legendary laws of a great ruler of the past like Óláfr, Edward, or Charlemagne, epitomized the medieval perception of law just described:

> The [mythological] law-giver is thought of not so much as an arbitrary law-maker as rather a specially strong and clear revealer of the True and the Good. God is the only law-giver in the fullest sense of the term. The law reveals itself, so to speak, in the wise rulers of early times. Even they do not create it; they bring it into day-light, and put men under its dominion… But because they are in some sense prophets or heroes, they surpass the mass of humans in their closeness to God, and as they possess superhuman powers, they themselves may well be venerated as makers of law… The law of the mythical law-giver was not even written; on the contrary it was exceedingly plastic and ill-defined; all that is good had a place in it; all that is bad was a later deviation from it and a corruption of it, and must be removed.[12]

It is important to place Kern's theory of the medieval "good old law" in its proper historiographic context. No doubt, this theory had deep roots in German historical jurisprudence of the nineteenth century. However, it was not so much the mainstream of the so-called "Historical School" dominating the field as a somewhat divergent tradition of thought represented by Jacob Grimm and Otto von Gierke that served as a point of departure for the argument of "Recht und Verfassung".[13] Unlike the majority of their colleagues who considered the law of the past chiefly from the viewpoint of its potential relevance for the full-scale legal reforms of their day, Grimm and von Gierke attempted to bring into relief the profound alterity of medieval legal thought, a theme that would later pervade "Recht und

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[10] Kern, "Recht und Verfassung," p. 18; *Kingship and Law*, p. 160.

[11] Kern's views on this matter seem to have undergone a change. In *Gottesgnadentum und Widerstandsrecht* he expressed an opinion that "the medieval Germanic notion of law … did not in the ultimate analysis envisage any downright unalterable rules; it claimed only that no change in existing conditions should take place unilaterally, without the free assent of those whose rights were affected". In "Recht und Verfassung" he restricted the sphere in which the creation of new rights had been possible to cases such as grants made by the king from his own possessions when rights of a third party were in no way affected, see Kern, *Gottesgnadentum*, pp. 148–49, and "Recht und Verfassung," pp. 5, 6, 24, 26.

[12] Kern, "Recht und Verfassung," pp. 14–15; *Kingship and Law*, pp. 157–58.

[13] See particularly Gerhard Köbler, *Das Recht im frühen Mittelalter, Untersuchungen zu Herkunft und Inhalt frühmittelalterlicher Rechtsbegriffe im deutschen Sprachgebiet*, Forschungen zur deutschen Rechtsgeschichte, vol. 7 (Cologne and Vienna: Böhlau, 1971), pp. 12–18.

Verfassung".[14] Kern also shared many of Grimm and von Gierke's opinions about individual aspects of the medieval idea of law. Their view that in the Middle Ages the law was conceived of as the common patrimony of the whole folk (in the same way as folk-song, folk-belief, and folk-speech were) is clearly recognizable in Kern's emphasis on the communal nature of the "good old law". Also, the theory of the medieval syncretism of the legal, the religious, the ethical, and the poetic, as well as the picture of the quasi-sacred law not subject to human will, mark a noticeable continuity between the three authors.[15]

Kern's conception of medieval law included other elements that can be traced to the works of his predecessors and contemporaries. It will be enough to mention a few most important of them. In his book about the role of custom in the legal thought of the Middle Ages Siegfried Brie argued that the medieval Germans had always attached much weight to the age of a given legal provision, and emphasized that a differentiation between "lawful" and "unlawful" customs had been inherent in German legal tradition.[16] At the time Kern was writing his *Gottesgnadentum und Widerstandsrecht* and "Recht und Verfassung", ideas broadly resembling his thesis were also voiced in anglophone scholarship. Like Kern, the British scholars R. W. and A. J. Carlyle emphasized difference between the modern and the medieval perception of law pointing out that the "conception that a law represents a mere command of a lawgiver, or even of a community," had been "wholly foreign to the Middle Ages."[17] The Carlyle brothers and their American colleague Charles McIlwain identified medieval law with custom and asserted that it had not, in the contemporary understanding, been conceived of as made by men, but rather as inherited from time immemorial. The medievals' had looked on this customary law as embodiment of the principles of justice, and therefore, it had been inviolable: rules inconsistent with this fundamental law had been void. Consequently, medieval legislative procedure had served not so much to express human will as to record that which had been recognised as already binding upon men.[18]

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[14] Cf. Gerhard Dilcher, "Mittelalterliche Rechtsgewohnheit als methodisch-theoretisches Problem," in *Gewohnheitsrecht und Rechtsgewohnheiten im Mittelalter*, Schriften zur europäischen Rechts- und Verfassungsgeschichte, vol. 6 (Berlin: Duncker & Humblot, 1992), pp. 32, 34–36.

[15] Jacob Grimm, "Von der poesie im recht," in his *Kleinere Schriften*, 8 vols. (Berlin: Dümmler, 1864–90) 6: 152–91, originally published in 1816; Otto von Gierke, *Das deutsche Genossenschaftsrecht*, 4 vols. (Berlin: Weidmann, 1868–1913) 2: 12–14, 126–27.

[16] Brie, *Gewohnheitsrecht*, pp. 225–51.

[17] R. W. Carlyle and A. J. Carlyle, *A History of Mediaeval Political Theory in the West*, 6 vols. (Edinburgh and London: Blackwood, 1903–36) 3: 41.

[18] R. W. Carlyle and A. J. Carlyle, *History* 3: 41, 45, 183–84; 6: 507; C. H. McIlwain, *The High Court of Parliament and its Supremacy: An Historical Essay on the Boundaries between Legislation and Adjudication in England* (New Haven: Yale University Press, 1910), pp. vii–viii, 51–52; *The Growth of Political Thought in the West from the Greeks to the End of the Middle Ages* (New York: Macmillan, 1932), pp. 184–88.

However, Kern did not just synthesize and developed views on the medieval law which had already been present in the previous scholarship, but also attempted to show how this perception of law had conditioned patterns of exercise of power in the Middle Ages. In this respect Kern's ideas proved extremely fecund for the next generation of historians who launched a vigorous attack on the conceptions of the traditional *Verfassungsgeschichte*.[19] One of the principal figures in this movement, the Austrian scholar Otto Brunner, argued, against the grain of previous scholarship, that feuds of local aristocracy far from having been just disorderly outbursts of violence had formed an intrinsic part of medieval legal order and had been conceived of by the contemporaries as the defence of traditional rights grounded in the "good old law".[20] The intellectual climate of Nazi Germany significantly furthered the success of the doctrines developed by Brunner and his cohort with their emphasis on the role of leadership, charisma, and community in history as well as the concomitant shift of focus from the study of social and political institutes to that of the "constitutional reality" in the sense of Carl Schmitt's legal philosophy.[21] Despite the subsequent defeat of the National Socialist regime, the influence of the new historical conceptions easily survived in academic circles of the German-speaking countries and contributed to the growing vogue of the theory of the medieval "good old law" among students of history and historical jurisprudence alike. In the course of a few years it gained entrance into all major textbooks of legal history.[22]

This story is immediately relevant to the understanding of the on-going heated debate over Kern's hypotheses in post-war German historiography that has noticeably affected the study of Scandinavian medieval law. The new generation of academics that began their carrier in the 60s was deeply concerned with the recent past of their country and their field of research.[23] It is well conceivable that the concept of the "good old law" seemed to them in some sense associable with the slogans of Nazi ideologues about the identity of law with the "popular sentiment" (*Volksempfinden*), the proclamations about the "natural law of the community" residing "in the call of the blood and in the innermost of the sound mind," and the sweeping assertions that "political constitution is not the written constitutional norms but

[19] Graus, "Verfassungsgeschichte des Mittelalters," pp. 554–55.
[20] Otto Brunner, *Land und Herrschaft, Grundfragen der territorialen Verfassungsgeschichte Südostdeutschlands im Mittelalter*, 3rd rev. ed. (Brünn, Munich, and Vienna: Rohrer, 1943), pp. 150–65.
[21] See Graus, "Verfassungsgeschichte des Mittelalters," pp. 559–69; W. Pohl, "Herrschaft," in RGA 14 (1999) 445–47, 449–50.
[22] See references in Köbler, *Das Recht im frühen Mittelalter*, pp. 20–21.
[23] See the remarks of Michael Stolleis in his *The Law under the Swastika, Studies on Legal History in Nazi Germany*, transl. Thomas Dunlap (Chicago: University of Chicago Press, 1998), pp. 10–11 and 42.

the foundational living order".[24] The participants in the debate never openly brought up such a link, to be sure. It is symptomatic, however, that the first and most resolute critics of the "good old law" theory, Klaus von See, Karl Kroeschell, and Gerhard Köbler, never failed to cite not only Fritz Kern himself but also the writings of Otto Brunner and the German jurist Walter Merk, although neither had added anything of significance to Kern's hypothesis as such.[25] A part of the explanation for this seemingly strange regard may lie in the fact that both had had ideological affiliations with the fascists, Merk notoriously, Brunner in a more oblique fashion.[26] The case of Brunner was more complex than that, though. As we have indicated above, he had developed his own historical conception drawing far-reaching implications from the idea of the "good old law". Therefore, for persistent critics of his overall viewpoint like von See and Kroeschell[27] it was necessary to disprove this premise together with other assumptions of Brunner and his cohort about lordship, fealty, and following in the Middle Ages. It is important to bear in mind this para-scientific background in order to understand why, for example, von See should have been at pains to refute the "good old law" theory in relation to medieval Scandinavian sources, even though nobody had actually applied it to them before.

It is curious that there had been virtually no serious criticism of Kern's conception within the fifty year interval between the publication of his *Gottesgnadentum und Wiederstansrecht*

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[24] Hans-Helmut Dietze, *Naturrecht in der Gegenwart* (1936), p. 317–18; Ernst Rudolf Huber, *Vom Sinn der Verfassung* (1935), pp. 6–7: "Die politische Verfassung ist nicht die geschriebene Verfassungsnorm, sondern die lebendige Grundordnung, in der das Volk geschichtliche Form gewinnt und zum Staate wird… Die Verfassung als lebendige Ordnung bedarf der formalgesetzlichen Normierung nicht; sie entsteht nicht durch Normen, sondern durch Taten"; both authors are quoted via Fritz Loos and Hans-Ludwig Schreiber, "Recht, Gerechtigkeit," in *Geschichtliche Grundbegriffe*, *Historisches Lexikon zur politisch-sozialen Sprache in Deutschland*, ed. Otto Brunner, Werner Conze, Reinhart Koselleck, 8 vols. in 9 (Stuttgart: Klett, 1972–97) 5: 306. See also Stolleis, *The Law under the Swastika*, pp. 20 –21, 87–101, 110, and Joachim Rückert, "Der Rechtsbegriff der Deutschen Rechtsgeschichte in der NS-Zeit: der Sieg des 'Lebens' und des konkreten Ordnungsdenkens, seine Vorgeschichte und seine Nachvirkungen," in *Die Deutsche Rechtsgeschichte in der NZ-Zeit, ihre Vorgeschichte und ihre Nachwirkungen*, ed. Joachim Rückert und Dietmar Willoweit (Tübingen: Mohr, 1995), pp. 177–240.

[25] See Klaus von See, *Altnordische Rechtswörter, Philologische Studien zur Rechtsauffassung und Rechtsgesinnung der Germanen*, Hermaea, n.s., vol. 16 (Tübingen: Niemeyer, 1964), p. 73 and n. 3, p. 77 n. 27, p. 84 n. 45; Karl Kroeschell, "Recht und Rechtsbegriff des 12. Jahrhunderts," in *Probleme des 12. Jahrhunderts*, Vorträge und Forschungen, vol. 12 (Stuttgart: Thorbecke, 1968), p. 324 n. 146; Köbler, *Das Recht im frühen Mittelalter*, pp. 19–20.

[26] See Robert Jütte, "Zwischen Ständestaat und Austrofascismus: Der Beitrag Otto Brunners zur Geschichtsschreibung," *Jahrbuch des Instituts für deutsche Geschichte* 13 (1984) 237–62; Harald Kahlenberg, *Leben und Werk des Rechtshistorikers Walther Merk: Ein Beispiel für das Verhältnis von Rechtsgeschichte und Nationalsozialismus*, Rechtshistorische Reihe, vol. 34 (Frankfurt a/M.: Lang, 1996).

[27] Klaus von See, *Das skandinavische Königtum des frühen und hohen Mittelalters, Ein Beitrag zum Problem des mittelalterlichen Staates*, Diss. (Hamburg, 1953), now published in an abridged form as *Königtum und Staat im skandinavischen Mittelalter*, Skandinavische Arbeiten, vol. 19 (Heidelberg: Winter, 2002); Karl Kroeschell, *Haus und Herrschaft im frühen deutschen Recht*, Göttinger rechtswissenschaftliche Studien, vol. 70 (Göttingen: Schwartz, 1968), and "Die Treue in der deutschen Rechtsgeschichte," *Studi medievali*, ser. 3, vol. 10 (1969) 465–89.

and von See's *Altnordische Rechtswörter* (1964). At most, the revisionists were able to build on the "discrete results" of the previous research that could be taken to "contradict Fritz Kern's doctrine."[28] For example, Wilhelm Ebel had pointed out that the earlier Middle Ages had known nothing of the figure of a "mythical lawgiver", a fact which is certainly significant for us.[29] Also, Hermann Krause had studied "endurance and transience in medieval law" and demonstrated that there had existed a noticeable tendency to repeatedly seek confirmation of grants of liberty or immunity, judicial decisions, etc. It had seemingly implied the principle that "the law must be as new as possible" had operated at least in certain spheres of medieval legal life, particularly in the domain of privilege rights.[30] However, Krause himself had interpreted this tendency as a consequence of the medievals' recognition of the lack of validity inherent in all new legal arrangements and as a resulting attempt to compensate for it by personally binding each new ruler through an act of confirmation of his predecessor's promises. According to Krause, formulas of perpetuity and guarantees of permanence ubiquitous in documents of that time had also, paradoxically enough, pointed to the same basic mistrust of new law, which had been just another avatar of the "good old law" thinking.[31] All in all, it is clear that however by itself stimulating the works of Ebel and Krause may have been for further research into medieval legal history, neither of them had attempted anything more than retouching one or another facet of Kern's portrait of medieval law.

The vigorous attack launched in the 60s on the doctrine of the "good old law" was but one particular manifestation of a general change of theoretical paradigm in post-war German-speaking historiography. It had begun with Felix Genzmer' paper about kinship structures (1950), Hans Kuhn's paper about following (1956), and František Graus' papers about fealty (1959 and 1966). These scholars had strongly criticized the conceptions developed by adherents of the new "constitutional history" such as Otto Brunner and Walter Schlesinger, and above all, their basic premise of a far-reaching continuity of Germanic patterns in medieval social, political, and legal life.[32] Significantly, the challenge had first come from

[28] Köbler, *Das Recht im frühen Mittelalter*, pp. 25–26. Cf. Johannes Liebrecht, "Das *gute alte Recht* in der rechtshistorischen Kritik," in *Funktion und Form: Quellen und Methodenprobleme der mittelalterlichen Rechtsgeschichte*, ed. Karl Kroeschell und Albrecht Cordes, Schriften zur Europäischen Rechts- und Verfassungsgeschichte, vol. 18 (Berlin: Dunker & Humblot, 1996), pp. 188–94.
[29] Wilhelm Ebel, *Geschichte der Gesetzgebung in Deutschland*, 2nd rev. ed., Göttinger Rechtswissenschaftliche Studien, vol. 24 (Göttingen: Schwartz, 1958), p. 12.
[30] Hermann Krause, "Dauer und Vergänglichkeit im mittelalterlichen Recht," ZRG GA 75 (1958) 221–17.
[31] Krause, "Dauer und Vergänglichkeit," pp. 217, 219, 221, 223, 226, 227–229.
[32] See a discussion and references in Graus, "Verfassungsgeschichte des Mittelalters," pp. 569–72; Pohl, "Herrschaft," pp. 447–53.

outside the field: Genzmer and Kuhn were primarily Germanic philologists. Also a philologist, Stefan Sonderegger, had given another important intellectual impulse to the coming critical assessment of the "good old law" theory in his study of the language of early medieval law, questioning the assumption of its affinity with Germanic poetic tradition.[33] This assumption, dating back to Jacob Grimm and shared, among others, by Fritz Kern, had been the cornerstone of the widely accepted view of medieval law of Germanic nations as essentially popular and, importantly too, distinct from the "soulless rationalism" of Roman law.[34]

Linguistic arguments played a crucial role in the criticism of the conception of the "good old law", too. Klaus von See scrutinized Fritz Kern's hypothesis in regard to Scandinavian medieval sources in his far-ranging study of their terminology relating to the notions of law and right, legal order and legal ethic (1964). Although Kern himself had only been marginally concerned with Scandinavia, its medieval laws had commonly been considered in German scholarship as a sort of repository of everything genuinely Germanic. Therefore, von See could regard his inquiry totally legitimate, even though no attempts had actually been made to interpret Scandinavian sources in terms of Kern's theory: "If [the notion of] 'folk-law', the predilection for the 'customary law' and the 'good old law' is not only a medieval and West Germanic, but indeed an ancient and common Germanic characteristic, then it should be particularly likely to find it in Scandinavian laws."[35] Von See pointed out that such expressions as *góðr réttr* or *góð lög* were virtually absent from the texts. He also noticed that in Scandinavian collections of laws instances when the terms *réttr* and *lög* were qualified as *forn* or *gamall* were fairly few, too. In his opinion, even such examples of *forn* or *gamall réttr* as there were could not be taken to support Kern's conception, since the word *réttr* referred in these contexts not to any "good" or "old" legal norm but simply to a personal claim or a prerogative. However, none of the examples he cited seems to be as clear-cut as he maintained, nor is it quite clear how it would contradict Kern's understanding of medieval law that all sorts of subjective rights were legitimized through the assertion of their high age.[36]

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[33] Stefan Sonderegger, "Die Sprache des Rechts im Germanischen," *Schweizer Monatshefte* 42 (1962–63) 259–71.

[34] Cf. Klaus von See, *Altnordische Rechtswörter*, p. 77, and *Deutsche Germanen-Ideologie vom Humanismus bis zur Gegenwart* (Frankfurt a/M.: Athenäum, 1970), pp. 49–52.

[35] von See, *Altnordische Rechtswörter*, p. 77.

[36] According to von See, *Altnordische Rechtswörter*, pp. 34: "die genannten Belege meinen vielmehr immer so etwas wie 'Vorrecht, persönliches Anspruch', der nicht durch Rechtsnormen, sondern durch sein bloßes Vorhandsein legitimiert ist: er bleibt, weil er schon vorher – vor der jetzt bestehenden Rechtsordnung – da war" (cf. p. 96). What exactly we are to make of this assertion, remains unclear, particularly when none of the texts he cited explicitly mentions or even drops a hint that there have been any changes in the legal order, which might affect the position of the parties.

Further, von See suggested that sometimes such collocations as *forn* / *gamal lög* did not need to imply anything more than a non-appraisive juxtaposition of older provisions with those in current use. He had to concede, however, that there were also other examples in which the idea was expressed that "because the rule is old, it needs no justification." Even though in some cases the context was perfectly secular,[37] von See insisted that the idea of the "good old law" had slipped into Scandinavian sources through clerical influence.[38] In his opinion, the figure of a "legendary lawgiver" had initially been absent from Scandinavian legal tradition, and the tendency to ascribe this role to St Óláfr had developed only gradually.[39] Finally, as von See pointed out, there was no indication in the sources of the idea that laws or judicial judgements had been "found" in accord with Kern's conception, but on the contrary, there was no lack of references to self-conscious lawmaking.[40]

Not confining himself to the criticism of various aspects of the "good old law" theory as such in its application to Scandinavian material, von See also brought into question a number of basic assumptions about medieval laws of the Nordic countries, which were conceptually related to Kern's ideas. First, the notion that medieval law was essentially popular came under von See's critical scrutiny. He pointed out that there was no special term in Old Norse to denote "folk-law", that alliterating formulas commonly considered as a manifestation of the folk spirit were most frequent in legal texts of a late date, and that the whole idea that the laws should be readily understandable to the common people had its origins in the doctrines of medieval canonists. In his view, knowledge of the laws in the society of medieval Scandinavia had always been confined to a small group of law experts.[41] Second, von See examined the group of Old Norse terms that related to the concept of "customary law" (*siðvenja*, *siðvani*, etc.) and came to the conclusion that the idea that all laws and legal institutes were and should be an expression of the customs of a given country and its people, had stemmed from the canon law and had not corresponded to the self-understanding of the Scandinavian legal tradition. He admitted that in a wide range of situations the laws had invoked custom and usage, but the custom in question had neither been the "customary law"

[37] As for example, in the article of *Grágás* where the laws relating to truce-breaking in Iceland and in other Nordic countries were compared and the divergence of the Icelandic practice was grounded in its antiquity ("That is ancient law in our country… But in Norway and wherever the Norse language is spoken it is law…"), cited in von See, *Altnordische Rechtswörter*, p. 97.
[38] von See, *Altnordische Rechtswörter*, pp. 96–98, 252.
[39] von See, *Altnordische Rechtswörter*, pp. 98–100.
[40] von See, *Altnordische Rechtswörter*, pp. 101–02, 251–52.
[41] von See, *Altnordische Rechtswörter*, pp. 57–63, 77–92, 252. Unfortunately, the German scholar did not express any opinion as to whether the *we*-style of the Norwegian books of laws pointed to the same thin layer of men of law.

nor individual "legal customs" but simply "some concrete particularity", something that differed from place to place and therefore required a "variable application of a given general rule".[42] Altogether, the whole picture of medieval Scandinavian law that von See painted in his study was profoundly different from the traditional conception: it was individualistic in its roots, thoroughly pragmatic, and mundane law.

The study of von See stimulated the opening of a discussion concerning the relevance of Kern's "good old law" to early medieval legal sources on the Continent. In 1968 Karl Kroeschell pointed out that there was no indication in the language of the texts that law had been conceived of as immutable. Even the term *ēwa* 'law', which, due to its presumed etymological affinity with Latin *aevum*, Greek *αἰῶν*, and Gothic *aiws* 'eternity, long time', was frequently invoked by scholars as a positive proof that law had been eternal and unchangeable in Germanic perception, was actually devoid of such associations in the contemporary usage and could appear in collocations like *êa scepphara* 'lawmaker' and *êue kepandi* 'lawgiver'. In general, the medievals were totally comfortable with the idea that law could be created from scratch.[43] Initially, age had no particular significance for legitimizing laws. However, it played a major part in the theory of custom (*consuetudo*) developed by Roman jurists and subsequently adopted by the church. Also, patristic writings emphasized conformity to reason (*ratio*) and truth (*veritas*) as an essential prerequisite for the validity of a given *consuetudo*. According to Kroeschell, early medieval sources sharply distinguished between *ius*, *lex*, and *consuetudo* with their vernacular counterparts, but this distinction was increasingly blurred in the later Middle Ages under the influence of the canonical doctrine that considered *consuetudo* as the basis of all human law. As a result of this development, the traditional characteristics of *consuetudo* could be applied to law in general. By way of conclusion Kroeschell remarked that scholars would do well to abandon the "assumption of a continuous Germanic / German notion of the 'good old law'."[44]

In a subsequent study Kroeschell addressed the question whether the law or a judicial decision in a particular case had been thought of as something pre-existing which those who sat in judgement were "discovering", in accord with Kern's conception. Kroeschell demonstrated that the phraseology of "finding" in relation to court sentences had been popular in some regions and completely absent from others. Further, he gave good reasons to believe that there was no question of Germanic continuity, and, in actuality, this usage could not have

[42] von See, *Altnordische Rechtswörter*, pp. 92–96, 252.
[43] Kroeschell, "Recht und Rechtsbegriff," p. 322, 326. On *ēwa* see also R. Schimdt-Wiegand, "Ēwa," in RGA 8 (1994) 35–37.
[44] Kroeschell, "Recht und Rechtsbegriff," pp. 323–25, 331, 333–35.

originated before the ninth century at the earliest. As for "discovery" of the law as such, Kroeschell argued that it was merely a figment of Kern and other scholars' imagination.[45]

Criticism of the conception of the "good old law" reached its peak in Gerhard Köbler's study of "origin and content of early medieval legal concepts in the German-speaking area" published in 1971.[46] Like von See and Kroeschell, he focused his attention on the terminology of the sources, but his project was considerably more ambitious as he tried to achieve statistically accurate results by meticulous registration of all occurrences of the key terms in the legal and documentary texts from the sixth to the eleventh century.[47] His main concern lay in disclosing Germanic legal notions, which as he believed, could be approached not so much on the basis of explicit statements in the sources as through a comparison between word-usage of late antique and early medieval texts, on the one hand, and between Latin and vernacular terms, on the other.[48]

In Köbler's opinion, there was nothing particularly Germanic about the idea of the "good old law".[49] Constitutions of Roman emperors referred to ancient laws and customs markedly more often than medieval sources. The age of a particular legal arrangement was occasionally mentioned in medieval texts, especially in the case of a custom (*consuetudo*), and this characteristic probably had been of some importance in the illiterate society of the early Middle Ages, but in Köbler's view, there was no indication that age had possessed a general constitutive significance. The idea that old law always and radically broke new lacked support in the sources.[50] The goodness was sometimes emphasized in relation to customs, but only very seldom in the case of laws and rights. Köbler observed that such appraisals were more frequent in medieval than in antique sources presumably because of the growing influence of the church. In any event, he insisted, there was no justification for Kern's thesis that goodness had been a *sine qua non* of medieval law.[51] He found no indication either of the idea that law was immutable, and remarked that Germanic kings had been making good use of late antique legislative techniques, seemingly unimpeded by such notions; when the flow of enacted law dried up later, it was a consequence of the general decline of administrative machinery and of

[45] Karl Kroeschell, "'Rechtsfindung': Die mittelalterlichen Grundlagen einer modernen Vorstellung," in *Festschrift für Hermann Heimpel zum 70. Geburtstag*, 3 vols., Veröffentlichungen des Max-Planck-Institut für Geschichte, vol. 36 (Göttingen: Vandenhoeck & Ruprecht, 1971) 3: 498–517.
[46] The subtitle of Köbler's *Das Recht im frühen Mittelalter*.
[47] For Köbler's views about the force of statistics see his *Das Recht im frühen Mittelalter*, pp. 3, 29 n. 122, 225.
[48] Köbler, *Das Recht im frühen Mittelalter*, p. 22.
[49] Köbler, *Das Recht im frühen Mittelalter*, pp. 221, 223; also pointed out by von See, *Altnordische Rechtswörter*, pp. 74–77.
[50] Köbler, *Das Recht im frühen Mittelalter*, pp. 221, 222–24, 225, 227–28.
[51] Köbler, *Das Recht im frühen Mittelalter*, pp. 221, 222, 224–25, 228.

the low level of literacy rather than the impact of the contemporary ideas of law.[52] The *topoi* of "restoration", "emendation", and "renovation" of laws were equally or even more characteristic of late antique constitutions and canons than of early medieval sources.[53] In Köbler's view, the assumption that the Middle Ages conceived of law as something that resided in the common conscience of the people was questionable.[54] On the whole, as Köbler argued, early medieval legal notions were much closer to those of late antique, or the so-called vulgar Roman, law than it had usually been assumed.[55]

Predictably, the criticism voiced by von See, Kroeschell, and Köbler encountered somewhat equivocal reactions. In a review of von See's book Anne Holtsmark welcomed the author's "unsentimental" approach aiming at a "deromanticization" of the received picture of medieval Scandinavian law and legal language but confessed that, to her, much in the book raised strong protest,[56] and that was probably a feeling many other readers shared. However, it is remarkable that none of the legal historians who worked with medieval Scandinavian material at that moment openly took a stand on von See's conclusions.[57] Only the historian of religions Otto Höffler, one of those representatives of the older generation whose views von See wished to demolish, furiously fell on the author to whom "nothing was holy," but that was only a recapitulation of the positions of the traditional Germanist doctrine, and their debate did not directly concern the issue of the "good old law".[58]

The reaction on Köbler's study was different. This time it was scholars with intellectual and ideological orientations very remote from the Germanicism of the interwar period who raised strong objections to the approach taken by the author. In a circumstantial review of the book Gerhard Dilcher voiced criticism of Köbler's quantifying method and pointed to the lack of attention on his part to such questions as educational and social background of the drafters of the documents, conventions of various genres with their models and a repertoire of *topoi*, and possible links between the changing meaning of legal terms and the developments in legal practice. Dilcher threw into question the author's assumptions that there had existed in the Early Middle Ages a "Germanic idea of law" and its rival, an "antique Christian idea of law",

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[52] Köbler, *Das Recht im frühen Mittelalter*, pp. 222, 224.
[53] Köbler, *Das Recht im frühen Mittelalter*, pp. 222, 224.
[54] Köbler, *Das Recht im frühen Mittelalter*, p. 225.
[55] Köbler, *Das Recht im frühen Mittelalter*, pp. 203, 212, 221, 228–30.
[56] Anne Holtsmark, review of von See, *Altnordische Rechtswörter*, in *Maal og Minne* (1965) 85–88.
[57] See the reviews of the book listed in *Idee, Gestalt, Geschichte: Festschrift Klaus von See, Studien zur europäischen Kulturtradition*, ed. Gerd Wolfgang Weber (Odense: Odense University Press, 1988), p. 714.
[58] See Otto Höffler, "'Sakraltheorie' und 'Profantheorie' in der Altertumskunde," in *Festschrift für Siegfried Gutenbrunner zum 65. Geburtstag*, ed. Oskar Bandle *et al*. (Heidelberg: Winter, 1972), pp. 71–116, and von See's reply in his *Kontinuitätstheorie und Sakraltheorie in der Germanenforschung: Antwort an Otto Höfler* (Frankfurt a/M.: Athenäum, 1972).

and that the extant sources embodied mentality that could be characterized, on the basis of word-usage, as representing one of these ideas. Instead, he suggested that one should differentiate between a) reminisces of Antiquity in the writings of educated clergy that had nothing to with realities of contemporary law and society; b) attempts to use the appropriated antique concepts in thinking about one's own law and society (attempts apparent, for example, in vernacular glosses of Latin terms that played a major role in Köbler's study); and c) the predominantly oral legal culture of aristocrats and *rustici*, influenced only in a small measure by patterns of the learned thought. In Dilcher's opinion, there was little hope of gaining insight into this oral culture through a lexicological study of abstract concepts of *ius*, *lex*, or *consuetudo*. As far as appraisal of Kern's hypothesis was concerned, Dilcher agreed that the qualities of age and goodness had scarcely been indispensable for law in medieval perception but stressed that nevertheless the legal culture of the early Middle Ages had been thoroughly traditional and that it was inconceivable that the church should have failed to get across some of her ideas of the good and the right already at that time. All in all, as he underlined, the clear-cut and harmonious picture of medieval law that Kern had painted could no longer be sustained in that form and needed further critical reconsideration.[59]

A number of other scholars tried to defend Kern's conception against the wave of criticism. Winfried Trusen (1972) insisted that too little heed had been paid to the difference between actually existent laws and the ideal of law, and this ideal, influenced as it was by Christian thought, grounded terrestrial law in divine will and presupposed that the laws should embody norms of justice existing from eternity. In Trusen's opinion, the quality of being "good" in this sense had a constitutive significance for medieval law in general, while the age was attached importance only in some spheres of legal life.[60] Hanna Vollrath (1982) argued that in the oral and highly traditional culture of the Middle Ages customary law had been thought of as intrinsically good and old, but it was only when it had been described from a viewpoint lying outside this popular culture that it had become necessary to explicate its goodness and age. However, she did not present any concrete evidence in support of her rather speculative argument.[61] More recently, Gerhard Dilcher (1992) returned to the question and emphasized that Kern's "Recht und Verfassung" still retained its relevance for the study

[59] ZRG GA 90 (1973) 267–73.

[60] Winfried Trusen, "Gutes altes Recht und consuetudo: Aus den Anfängen der Rechtsquellenlehre im Mittelalter," in *Recht und Staat: Festschrift für Günther Küchenhoff zum 65. Geburtstag*, ed. Hans Hablitzel and Michael Wollenschläger (Berlin: Duncker & Humblot, 1972), pp. 189–204. Cf. also Dilcher, "Mittelalterliche Rechtsgewohnheit," pp. 35–36.

[61] Hanna Vollrath, "Herrschaft und Genossenschaft im Kontext frümittelalterlicher Rechtsbeziehungen," *Historisches Jahrbuch* 102 (1982) 51–60.

of medieval law inasmuch as it advocated an approach to the subject based on recognition of its profound alterity. In Dilcher's opinion, Kern's approach had much in common with the present-day historical anthropology.[62]

There is still no consensus among German medievalists on the question of the "good old law".[63] Over eighty odd years attempts have been made to adapt Kern's ideas to changing conceptions and concerns of succeeding generations of scholars. Also, the criticism that has been raised seems to have been directed not so much against the original formulation of this theory as against its various adaptations.[64] Hence, von See, Kroeschell, and Köbler were more concerned with showing that the "good old law" could not have been an indigenous Germanic concept – an idea that Kern himself had never voiced – than with seriously addressing the question actually posed by Kern as to what made early medieval laws legitimate and binding in the understanding of the contemporaries. However, it is impossible to agree with those proponents of Kern's thesis who maintain that the criticism has not affected the validity of his conception, aside from the ultimately inessential question of its Germanic or Christian origins. Critical examination of the sources, both continental and Scandinavian, has demonstrated that many of Kern's inferences were founded on unwarranted generalization whereas some others simply lacked all support in the material.

So far we have been concerned with the debate about the medieval "good old law" in German-speaking historiography. However, after an English translation of *Gottesgnadentum und Widerstandsrecht* and "Recht und Vervassung" was published in 1939, Fritz Kern's theories became disseminated among much wider circles of medievalists, and it is necessary now to take a brief overview of the main trends of the discussion concerning the validity of these theories in anglophone scholarship before we go on to examine the widely opposing viewpoints on the issue in contemporary Norwegian historiography.

Introducing the book and its author to the reader, the translator, S. B. Chrimes, remarked that Kern's works were particularly valuable to students of English constitutional history on account of their method:

> [Kern] produces his results by working in the border-lands between what the Germans call *Geistesgeschichte* or the History of *Weltanschauung* … and Legal (Constitutional) History … By studying political ideas in close relation to actualities and as understood by practical men and the people at large, he avoids the unfortunate abstraction and academic character which pervades almost all Histories of mediaeval Political Thought. Here we find the assumptions and

[62] Dilcher, "Mittelalterliche Rechtsgewohnheit," pp. 36–37, 43–44, 59.
[63] Liebrecht, "Das *gute alte Recht* in der rechtshistorischen Kritikk," pp. 187–88, 199–204.
[64] Cf. Liebrecht, "Das *gute alte Recht* in der rechtshistorischen Kritik," p. 203.

> ideas not of philosophers and scholastics, but of the men who governed and were governed – notions of far greater importance to all students … than learned systems of political doctrine.[65]

Chrimes' remarks shed light over the intellectual orientation prevailing in medieval studies in Britain and the USA at that time, the orientation which was not particularly favourable for an adequate understanding of the approach taken by Kern in his studies. As we have seen, questions that were raised in *Gottesgnadentum und Widerstandsrecht* and "Recht und Vervassung" were also discussed in early-twentieth-century anglophone scholarship, although with an essential difference of perspective. Remarkably, the British and American historians who developed views on medieval law resembling Kern's "good old law" were all just those students of political thought whom Chrimes was rebuking for the "unfortunate abstraction" of their outlook. It seems that the works of the Carlyle brothers and McIlwain not only to an extent prepared the soil for a warm reception of Kern's conception by some contemporary British and American medievalists but also influenced the way that many of Kern's anglophone critics approached the issue.

The intellectual agenda of many among them was a quest for the "medieval origins of the modern state", to cite the programmatic title of Joseph Strayer's book.[66] Their efforts were directed, among other things, to demonstrating that twelfth- and thirteenth-century jurisprudence had developed intricate theories of legislation, sovereignty, and state and that these theories had made a profound impact on contemporary techniques of government. To these scholars, Kern's sweeping remark that the Middle Ages had known "no genuine legislation by the State"[67] did not seem anything more than a "paradox brilliantly sustained".[68] They failed to see that Kern's argument mostly concerned the earlier Middle Ages, a point which the author himself had not perhaps made explicit enough, but which was rightly emphasized in the translator's introduction.[69] Also, their objections missed another significant feature of Kern's approach to medieval law, namely his focus on popular belief rather than on learned jurisprudence of which, no doubt, he had been well aware. It seems that Kern's American critics took him for just another student of political thought in the conventional sense, like the Carlyle brothers or McIlwain, even though in actuality the German scholar's agenda differed a lot from theirs. Therefore, when Kern's critics occasionally attempted to refute his argument also as far as the earlier Middle Ages were concerned, they cited passages

[65] S. B. Chrimes, "Introduction," in Kern, *Kinship and Law*, pp. xvi–xvii.
[66] Cf. Paul Freedman and Gabriel M. Spiegel, "Medievalisms Old and New: The Rediscovery of Alterity in North American Medieval Studies," *American Historical Review* 103 (1998) 686–90.
[67] Kern, *Kinship and Law*, p. 184.
[68] T. F. T. Plucknett, *Legislation of Edward I* (Oxford: Clarendon, 1949), p. 6 n.
[69] Chrimes, "Introduction," in Kern, *Kinship and Law*, pp. xxvii–xxviii.

from Isidore of Seville or the *Lex Romana Visigothorum* not troubling themselves with the question about whether evidence of that sort reflected the understanding of law among the people at large.[70] As the outcome of that criticism, a broad consensus among anglophone medievalists and legal historians has crystallized to the effect that Kern's thesis is largely valid, but only as far as the Early Middle Ages are concerned. That there has been a heated debate in post-war German scholarship over the validity of the "good old law" concept in relation to that epoch exactly, has remained virtually unnoticed.

The scene of Scandinavian, and particularly Norwegian, historiography, to which we turn now, has been by far less tranquil. The impact of Kern's ideas became visible here only by the late 60s – early 70s.[71] Before long, the Norwegian scholar Kåre Lunden published a popular survey of medieval history in which an extensive use was made of the conception of the "good old law" (1976). Lunden argued that Norwegian society in the High Middle Ages had been unfamiliar with the idea of legislative sovereignty and that there had not existed any institutionalized forms of establishing new laws of indubitable validity. The law had been thought of as essentially immutable despite the fact that, from the perspective of the modern historian, there had actually been a lot of legal change at that time.[72] However, he only gave very few specific examples of this outlook in Norwegian medieval sources, a fact that was immediately pointed out by his critics.

Reviewing Lunden's book, Knut Helle took a strong objection to the author's unreserved enthusiasm for Kern's conception, "somewhat outdated", in his view. He indicated, with a reference to the works of Sten Gagnér and Hermann Krause, that it had been demonstrated that a veritable "legislative ideology" had developed in Europe in the course of the twelfth and thirteenth centuries, and suggested that the Norwegian monarchy's legislative ambitions, evident from the 1260s onwards, had been but a local manifestation of this general trend. Also, Helle reminded of Klaus von See's argument and suggested that the idea of the "good old law", introduced into Scandinavia under ecclesiastical influence, had been utilized as a camouflage for real and conscious legislation.[73]

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[70] For example, see William E. Brynteson, "Roman Law and Legislation in the Middle Ages," *Speculum* 41 (1966) 422–26.

[71] See the references to Kern and the "good old law" in Sigurður Líndal, "Sendiför Ulfljóts, Ásamt nokkrum athugasemdum um landnám Ingólfs Arnarson," *Skírnir* 143 (1969) 6–7; Ole Fenger, *Fejde og mandebod, Studier over slægtsansvaret i germansk og gammeldansk ret* (Copenhagen: Juristforbundet, 1971), pp. 34, 36; Ole J. Benedictow, "Konge, hird og retterboten av 17. juni 1308," HT 51 (1972) 243–44.

[72] Kåre Lunden, *Norge under Sverreætten 1177–1319*, Norges historie, ed. Knut Mykland, vol. 3 (Olso: Cappelen, 1976), pp. 25–27, 30–32, 389–95, 410.

[73] Knut Helle, "Nye og gamle synspunkter på det norske middelaldersamfunnet," *Heimen* 17 (1976–78) 517–18.

That was only the beginning of a long and heated debate, which has gradually involved many other Norwegian medievalists. Kern's original thesis has quickly and tacitly been reduced to the question about whether or not legal changes that were actually taking place in medieval Norway were perceived as such by the contemporaries. Lunden has adamantly sustained his view that legislative sovereignty can only be attributed to the modern state and that the understanding of law as something essentially unchangeable (which he identifies with the natural-law thinking) dominated in the medieval, or – in his own terms – feudal, society.[74] For his part, Helle has conceded that fully developed legislative sovereignty is only characteristic of the modern state, but sprouts of this ideology, which he and Lunden identify with legal positivism,[75] were already present in thirteenth-century Norway as elsewhere; in other words, Norwegian kings of that time legislated in a meaningful sense of the term. Moreover, from the earliest epoch the medieval Norwegians had been totally comfortable with the idea of a deliberate legal change, and the "good old law" language, imported by the church around the end of the twelfth century, was just a means for the monarchy to transfer the power to make laws from the popular assemblies to their own hands.[76]

At the outset, the debate over Kern's thesis was conducted in very abstract terms, even though Helle already at that moment proposed that the relevant source material should be re-examined as far as possible from the perspective of the attitudes towards law and legal change.[77] However, the first attempt at such an investigation was not taken before the mid-80s. At that time the historian Edwin Torkelsen in collaboration with Grethe Authén Blom

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[74] Kåre Lunden, "Hovudsynspunkt på mellomaldersamfunnet," *Heimen* 18 (1979–81) 50–51; "Norsk tronfylgjerett i seinmellomalderen og lovgjevningssuvereniteten," *Historisk Tidsskrift* 65 (1986) 393, 410–19; "Rettspositivisme, positiv rett og suksesjonsrett i mellomalderen," *Historisk Tidsskrift* 67 (1988) 29–44; "Rett og realitet: Rettsreglane i norsk mellomalder, på ein kulturell og sosial bakgrunn," *Forum mediaevale* (1998:1) 1–51; "Rett skal vere rett?" *Forum mediaevale* (1999:1–2) 43–47.

[75] More precisely, Helle uses the term "lovgivningspositivism" to denote an early stage in this development assuming that this meaning is inherent in the German term "Gesetzpositivismus" as opposed to "Rechtspositivismus", the fully developed legal positivism, see his "Lov og rett i middelalderen – et tilsvar til Kåre Lunden," *Forum mediaevale* (1998:2) 2. On this, Lunden, "Rett skal vere rett?" p. 43 n. 1, reacts: "Poenget med 'rettspositivism' er at *retten* er menneskeverk – som ikkje alle er samde i. Men "lova" som *vedtekne* reglar, må nødvendigvis etter alle si oppfatning vere meneskeverk (anten lova skaper ny rett eller ikkje). Alle er for så vidt nødvendigvis 'lovgjevningspositivistar'." However, in German scholarship the term "Gesetzpositivismus" is either used as a synonym of "Rechtspositivismus" or applied to the extreme version of legal positivism that prevailed in the late nineteenth and the early twentieth century, see E. Kaufmann, "Rechtspositivismus," in HRG 4 (1990) 321–22.

[76] Knut Helle, "Litt mer om det norske middelaldersamfunnet: Tilsvar til Kåre Lunden," *Heimen* 18 (1979–81) 86–87; "Rettsoppfatninger og rettsendringer: Europa og Norge i middelalderen," in *Festskrift til Historisk institutts 40-årsjubileum 1997*, ed. Geir Atle Ersland *et al*., Historisk institutt, Universitetet i Bergen, Skrifter, vol. 2 (Bergen: Historisk institutt, Universitetet i Bergen, 1997), pp. 41–70; "Lov og rett i middelalderen – et tilsvar til Kåre Lunden," *Forum mediaevale* (1998:2) 1–6; "Lov og rett i middelalderen," in *Norm og praksis i middelaldersamfunnet*, ed. Else Mundal and Ingvild Øye, Kulturtekster, vol. 14 (Bergen: Senter for europeiske kulturstudier, 1999), pp. 7–22; "På stedet marsj," *Forum mediaevale* (1999:1–2) 49–51.

[77] Helle, "Litt mer om det norske middelaldersamfunnet," p. 87; cf. Lunden, "Norsk tronfylgjerett," p. 418–19.

published a paper about the validity of the law of royal succession from 1163~64. There he argued that in twelfth-century Icelandic and Norwegian sources there was no indication of the idea that the law was considered as immutable. On the contrary, the law served practical interests, with the corollary that legal provisions could be promulgated, abrogated, or altered if needed.[78] Further, Torkelsen insisted that changes in the laws were subject to a formalized procedure, which was intended to secure consent of the parties concerned and ensure notoriety of the decision. In his opinion, conformity to this procedure made the new law valid, and from this moment it overruled any previous arrangements that were at variance with it.[79]

Torkelsen's understanding of validity occasioned critical comments of Per Norseng (1987). As he pointed out, the simple fact that those who formulated new legal provisions insisted on their validity should not be confused with the question about how binding these provisions were to the public conscience.[80] Norseng suggested that Kern's model of medieval law accounted well for certain peculiarities of the legal and political life in medieval Norway, which were hardly explicable from the perspective of Torkelsen's notion of validity based on formal criteria: "Legal innovations were not tantamount to setting aside older contradicting law… Theoretically, older regulations could be mobilized as legal sources in conflicts as long as there existed people who did not accept the last formulated legal rules."[81] As an example of such a way of thinking, Norseng pointed out Sverrir's line of argument in his conflict first with Magnús Erlingsson and then with the church. In Norseng's opinion, twelfth- and thirteenth-century Norway was generally characterized by an "unclarified relationship between various legal sources and between old and new law."[82]

Of late, Knut Helle has called attention to the image of King Óláfr Haraldsson as legislator that make an appearance in many medieval sources.[83] In Helle's opinion, this image had been gradually developing over a long time span under the influence of Óláfr's growing fame as a saint, but it was only in the latter half of the twelfth century, in the life of the saint king written by Archbishop Eysteinn, that the tendency first materialized to identify the "laws of St Óláfr" with eternal higher law. In this connection Helle points to the words of *Passio Olavi* describing the laws established by the saint king as "divinas et humanas" and interprets the term "divinae leges" as "divine laws" having the character of natural law and hence

[78] Edwin Torkelsen and Grethe Authén Blom, "Fra gammel rett til ny lov: Noen problemer knyttet til nymælers 'gyldighet'," HT 63 (1984) 248–53.
[79] Torkelsen and Blom, "Fra gammel rett til ny lov," pp. 253–56, 263–64.
[80] Per Norseng, "Gammel rett, ny lov – et fett?" HT 66 (1987) 67, 75, 79, 80–81.
[81] Norseng, "Gammel rett," pp. 66–67.
[82] Norseng, "Gammel rett," p. 81.
[83] Helle, "Rettsoppfatninger og rettsendringer," pp. 55, 57–67.

inviolable, while "humanae leges", according to Helle, should be construed as customary law.[84] (The fact that "divinus" as opposed to "humanus" can in medieval Latin usage simply mean "pertaining to things sacred" or "ecclesiastical" and that "divine law" was commonly understood by medieval authors as the divine will expressed in the Scripture has evidently escaped the scholar's notice[85]). Finally, by the end of King Hákon Hákonarson's reign, the "laws of St Óláfr" begin to represent some sort of "divine natural law" that Hákon purported to "restore" to his subjects in order to free himself from the shackles of the positive law.[86]

In a recent article (2001) Sverre Bagge approaches the question how medieval Scandinavian audiences understood the law from the point of view of judicial process. As point of departure, he takes the saga story about King Sigurðr Jórsalafari's suit against Sigurðr Hranason. In Bagge's opinion, this story indicates that, in the contemporary conception, the law could be changed. Moreover, it was easily adapted to changing conditions and was largely created *ad hoc* in concrete situations. On the other hand, he finds traces of the notion that the judges at the assembly were to "find" the law in a way broadly resembling the idea of the "good old law". According to Bagge, the paradox consists in the fact that, to the saga author, there was not much difference between "making" and "finding" the law.[87]

In the previous paragraphs we have given an outline of major currents in the ongoing discussion about attitudes towards law that characterized medieval society. This survey gives an occasion for some general remarks concerning approaches to the legal situation in twelfth- and thirteenth-century Norway from this perspective. As one modern commentator remarked, "whenever we have a complex question that has been answered Yes or No, we may suspect that something has been left out in the process." This seems to be the case with the Norwegian debate over the "good old law", too. As we have seen, Fritz Kern inquired in his "Recht und Verfassung" what gave medieval law a binding force and concluded that at that time law was grounded in its age and goodness. Whether or not that was the legacy of some pre-medieval Germanic legal culture, was of marginal interest to him, and is, in our opinion, quite irrelevant for understanding of the actualities of high medieval Norway. It is more important for our

[84] Helle, "Rettsoppfatninger og rettsendringer," pp. 61–62.
[85] Cf. Gratian, D. 8 c. 1: "Diuinum ius in scripturis diuinis habemus, humanum in legibus regum." Also, it is not clear what exactly we are to make out of the term "divine natural law" which Helle frequently uses. In medieval jurisprudence, all natural law was often considered as divinely instituted, and divine law was partly natural, partly positive. On divine-law tradition see A. Wegner, "Über positives göttliches Recht und natürliches göttliches Recht bei Gratian," *Studia Gratiana* 1 (1953) 503–18; Yves Congar, "Jus divinum," *Revue du droit canonique* 27 (1978) 108–22.
[86] Helle, "Rettsoppfatninger og rettsendringer," pp. 64–66.
[87] Sverre Bagge, "Law and Justice in Norway in the Middle Ages: A Case Study," in *Medieval Spirituality in Scandinavia and Europe: A Collection of Essays in Honour of Tore Nyberg*, ed. Lars Bisgaard *et al*. (Odense: Odense University Press, 2001), pp. 73–85.

purposes to notice that Kern's argument tacitly left out of the discussion the possibility that in the Middle Ages legal arrangements could in different cases derive their validity from various sources. This multiplicity of legal forms has been convincingly demonstrated in the studies of Wilhelm Ebel and other scholars.[88] Certainly, Ebel's categories of *Weistum*, *Satzung*, and *Rechtsgebot*, based as they are on the evidence of medieval Germany, cannot be straightforwardly applied to the Norwegian material, and it is hard to tell just how dissimilar the situation was here and there before a close examination of the sources is carried out from this angle, but at the very outset it seems likely that legal life in medieval Norway was no less rich in forms of creating bindingness. Some provisions in Norwegian provincial collections of laws explicitly refer to an agreement made at the assembly between the people and the king and / or the bishop, or between the farmers themselves.[89] In other cases the legal force of a provision of law is grounded in the oath given by the thingmen or the guildsmen.[90] In all these and some other instances, the age of the law could hardly have been of any significance for its validity, and such goodness as may have been ascribed to it was, obviously, of a nature quite distinct from that envisaged by Kern: in his conception, a given legal norm is good, because it has been so from eternity, with the corollary that anything else would inevitably be a departure from justice; in a Norwegian legal text, however, the farmers envision a possibility of coming to an agreement on some different terms. All in all, it seems that no notion of legislative sovereignty was necessary in order that laws could, at least in some situations, dispense with the two qualities that Kern indiscriminately attributed to all medieval law.

Sweeping generalization that is not infrequently apparent in Kern's approach probably constitutes its greatest, although not sole, weakness. This tendency to discuss medieval law in exceedingly broad terms, to draw inferences about the whole from an analysis of a particular clause of a law-book, and this when the meaning of the text is often not immediately transparent, has been typical of the Norwegian debate, too. It has become clear in the course of this debate that there are in fact not so many sources from the period under consideration in which a noticeable emphasis is laid on the age of a given legal rule or personal right. Instead of explaining away or boldly extrapolating this evidence, it would perhaps be more fruitful to closer examine these sources in their ideological and social setting. There is no doubt that Kern did not just conjure up the "good old law" out of thin air. Regardless of whether or not the medieval Norwegians could envision a deliberate legal change and lawmaking, regardless

[88] Ebel, *Geschichte der Gesetzgebung*, pp. 11–27.
[89] G 3, 8, 9, 15, 297, 314, ed. Keyser and Munch in NgL 1: 4, 6, 7, 9, 97, 103.
[90] G 6, 7, ed. Keyser and Munch in NgL 1: 6; *Statute of St Óláfr's guild in the Gulathing district* 1, ed. Storm in NgL 5: 7.

of the grave doubts that we may have as to many of Kern's assumptions about medieval law, it still remains an observable fact that the good law of the past was indeed invoked on a variety of occasions in medieval Norway as elsewhere. The important question is which particular circumstances made this possible and expedient.

It is necessary to delineate more precisely the spheres of social and political life in which an opportunity presented itself to appeal to the good law of the past. As we have seen, Per Norseng has pointed out one such sphere: in a conflict over rights one of the parties could sometimes ground their claim in legal norms which the other party considered superseded. Norseng's argument seems very convincing as far as we assume that disputes and the business of settling them centred on questions of law in the sense of substantive principles. This was apparently true in the instances he has mentioned: conflicts over succession to the throne or tariffs of penalties in the archbishop's suits (we will have a closer look at these examples further in our study). But was it characteristic of legal life in twelfth-century Norway on the whole? Much research into the process of dispute-settlement needs to be done before we can answer this question with some degree of certainty. As yet, we can only hypothetically suppose that the workings of this process bore a broad similarity to what was going on in other medieval communities, which have long since become an object of study from this perspective. Among other things, it appears that, previous to the emergence of a developed system of royal justice in the late twelfth and the thirteenth century, litigation procedure in the lay courts of Europe gave little room for an appeal to, and application of, substantive rules of law.[91] This observation not only renders doubtful Kern's theory of "judgement-finding" but also suggests that Norseng's model of conflict involving recourse to the good law of the past should not be overly generalized.

In the following discussion of the history of the notion of the "laws of St Óláfr" we will make an attempt to disclose some other areas of legal life where the need to stress the age of a law or right could sometimes arise.

[91] See particularly Fredric L. Cheyette, "Custom, Case Law, and Medieval 'Constitutionalism': A Re-Examination," *Political Science Quarterly* 78 (1963) 366–71, and "Suum cuique tribuere," *French Historical Studies* 6 (1970) 287–99; Kroeschell, "Rechtsfindung," pp. 512–15.

CHAPTER 2

In Search of the Origins

King Óláfr Haraldsson's reputation of legislator: the case of scald Sighvatr

When did the notion of the "laws of St Óláfr" originate? At first glance the question may seem odd. Indeed, there is a broad consensus among scholars that Óláfr Haraldsson's reign was a time of profound changes in Norwegian legal life. The introduction of Christianity was, after all, also a matter of the law. It is inconceivable that the king, who put so much effort into establishing the new religion, should have played no part in the wide-ranging lawmaking which regulation of various issues of Christian observance, ecclesiastical organisation, and relations between the church and the lay society presumably entailed. Therefore, it would seem reasonable to assume, with Grethe Authén Blom and Knut Helle, that Óláfr's well-established reputation of a legislator among his contemporaries provided a natural point of departure for the development of a legendary tradition about the laws that the saint king gave to his subjects, a tradition which increasingly fictionalised the historical fact lying in its foundation.[92]

Finding out the facts is, however, a tricky task in this case. The evidence of the sagas on this point has been taken with a great deal of scepticism ever since Konrad Maurer who pointed out that saga writers had been strongly influenced, on the one hand, by the clichés of the hagiographical legend and, on the other, by Norwegian political realities of their own day when the "laws of St Óláfr" had frequently been invoked as the grand safeguard of traditional rights and liberties.[93] Also, it is exceedingly difficult to sift out those legal provisions which

[92] Grethe Authén Blom, "St. Olavs lov," in *Olav: konge og helge, myte og symbol* (Oslo: St. Olav Forlag, 1981), p. 61, defines the problem she sets out to investigate as follows: "hvordan de lover Olav Haraldsson medvirket til i sin kongstid ble til St. Olavs lov"; Knut Helle, "Rettsoppfatninger og rettsendringer," p. 58, notes that "tradisjonen om Hellig-Olav som lovgiver hadde et historisk utgangspunkt i at han virkelig fastsatte positive lovbestemmelser i kristenretten og kanskje også på andre rettsområder. … Parallelt med Olavs økende helgenry i ettertiden ble hans gjerning på lovens og rettens område forstørret."

[93] Konrad Maurer, "Die Entstehungszeit der ælteren Gulaþingslög," in *Abhandlungen der philosophisch-philologischen Classe de königlich bayerischen Akademie der Wissenschaften*, vol. 12, pt. 3 (Munich: Verlag der Akademie, 1871), p. 105. Cf. Ebbe Hertzberg, "Vore ældste Lovtexters oprindelige Nedskrivelsestid," in *Historiske afhandlinger tilegnet Professor Dr. J. E. Sars paa hans 70. fødselsdag* (Kristiania: Aschehoug, 1905), pp. 92–93; Edvard Bull, *Det norske folks liv og historie gjennem tidene*, vol. 2, *Fra omkring 1000 til 1280* (Oslo:

date back to Óláfr's time from later material in the extant books of laws. It is only in the Christian Laws Section of *Gulaþingsbók* that we find provisions explicitly attributed to his epoch. Their number is small, and their content is of a very specific nature. The clauses in question say that at the initiative of King Óláfr and Bishop Grímkell it was stipulated at an assembly on Moster Isle that Christian religion is to be kept, that Sundays and a number of mass-days are to be honoured, that the bishop is to govern the churches as far as appointment and ordination of priests is concerned, and that men in each district (*fylki*) are to maintain the "head church" (*höfuðkyrkja*) there and provide for the priests' livelihood.[94] This does not amount to very much in comparison with the all-embracing notion of the "laws of St Óláfr" as we find it in late-twelfth- and thirteenth century sources. But maybe the king's role in enacting these and similar provisions could nevertheless provide a sufficient base for his renown as a lawgiver in the eyes of his contemporaries? Answering this question in the affirmative, Blom and Helle cite two eleventh-century stanzas by the scald Sighvatr Þórðarson, Óláfr's court poet and friend.

In one of them Sighvatr says:

> loftbyggvir, mátt leggja
> lands rétt þanns skal standask,
> unnar, allra manna,
> eykja, liðs í miðli.[95]

> "The stern-dweller of the horse of the wave [horse of wave = ship; stern-dweller of ship = warrior]! you are capable of establishing *lands réttr* amongst all men which will prevail."

We do not know if this fragment preserved only in Snorri's *Óláfs saga ins helga* was originally a *lausavísa* or formed a part of a longer poem, nor when, and under which circumstances, it was composed.[96] The wording of the stanza seems transparent enough, and it is only the expression *lands réttr* (or *landréttr*, as in some manuscripts) that present some difficulty for interpretation. The term is a *hapax* in the corpus of scaldic poetry, and in the provincial books of laws it does not occur either, while in thirteenth-century saga prose, in Snorri and elsewhere, the word is common and nearly always used there as the *member*

Aschehoug, 1931), p. 40; Per Sveaas Andersen, *Samlingen av Norge og kristningen av landet 800–1130*, Handbok i Norges historie, vol. 2 (Bergen, Oslo, and Tromsø: Universitetsforlaget, 1977), p. 113; Knut Helle, *Gulatinget og Gulatingslova* (Leikanger: Skald, 2001), p. 39.

[94] See respectively G 10, 15, and 17, ed. Keyser and Munch in NgL 1: 7, 9, 10, 111; ed. Storm in NgL 4: 3, 4. Moster thing is also mentioned in F 3.1, ed. Keyser and Munch in NgL 1: 147, in connection with the prohibition of incest.

[95] Skjd. 1B: 226.

[96] In the saga the verse is introduced without any additional comments. Finnur Jónsson, *Den oldnorske og oldislandske litteraturs historie*, 2nd ed., 3 vols. (Copenhagen: Gad, 1920–23) 1: 587–88, conjectures that the half-stanza is the only surviving fragment of a *drápa* which Sighvatr composed in praise of Óláfr at some point between 1020 and 1028.

otiosus in the alliterating pair *lög ok landsrétt*, which simply means 'laws of the land'.[97] It is only natural then that Snorri takes the scald's utterance for an acclamation of the king's lawgiving: "you can lay down law" and uses it in order to support his own detailed report of Óláfr's legislation (below we shall have a look at this report, which is interesting in its own right).

Whether this was what Sighvatr was actually saying is, however, far from clear. As Klaus von See has convincingly shown, the Old Norse *réttr* initially had a spectre of meanings that centred on the idea of a legal, justifiable title or claim to something, a personal right, whereas the meaning of a "system of objective legal norms" was covered by the term *lög*. This distinction got increasingly blurred with the course of time, but even then expressions such as *guðs réttr* in reference to the system of norms for which the Church claimed validity apart from, and above, secular laws and customs still retained a vestige of the original contrast to the sense of *lög*.[98] Also, in all instances when *réttr* occurs in pre-thirteenth-century scaldic verse, it has the meaning of a "claim to something", as in the verse by Sighvatr's contemporary, Þórmóðr Kolbrúnarskáld, who speaks of his right to receive gold from the king in reward of his poetry,[99] or that of "rights, privileges", which the king can give to the people of a region (cf. *réttarbót*), as in the case of King Magnús berrfœtr and the Upplanders: "He gave men those privileges (*rétt*) which the prudent farmers were to repay with loyalty";[100] but there are no examples of the use of *réttr* in the sense of "objective legal order". It would seem unwarranted therefore to assume that the terms *lög* and *lands réttr* had been as easily interchangeable for Sighvatr as they were for Snorri and to interpret the scald's words as an assertion to the effect that the king was establishing a body of legal norms among his subjects.

Although it is hardly possible to say exactly what meaning *land(s)réttr* had in Sighvatr's verse since we do not know the setting in which this half-stanza originally stood, one should probably see it in the broader context of the contemporary ideal of kingship with its strong emphasis on the king's role as the maintainer of order and justice in the society. Instead of reading the stanza as an acclamation of Óláfr's legislative ambitions, it would perhaps be

[97] Snorri uses the expression *lög ok landsréttr* many times, see *Hkr (Hhárf)* 6; *Hkr (Hákgóð)* 12 and 15; *Hkr (Ólhelg)* 58, 60, 117, 127, 137, and 181; *Hkr (MErl)* 12 and 21, ed. Bjarni Aðalbjarnarson 1: 98, 165, 170; 2: 74, 77, 197, 219, 242, 328; 3: 387, 396. Outside this collocation *landsréttr*, also with the meaning "laws of the land" occurs only two times in *Heimskringla*, see *Hkr (Ólhelg)* 130 and *Hkr (MErl)* 21, ed. Bjarni Aðalbjarnarson 2: 222 and 3: 396.

[98] von See, *Altnordische Rechtswörter*, pp. 29–30, 52–57. On directly comparably developments in the terminology of continental legal sources see Kroeschell, "Recht und Rechtsbegriff," pp. 314–18.

[99] Þórmóðr Kolbrúnarskáld, *lausavísa* 10, in Skjd. B1: 262.

[100] Gísl Illugason, *Erfikvæði um Magnús berrfœtr* 7, in Skjd. B1: 410.

better-advised to understand the scald's utterance as something like "King! you are capable of establishing right among all men which will prevail!"

This ideal of king and its antithesis find a particularly forceful expression in Sighvatr's *Bersöglisvísur* ("Outspoken" or "Unvarnished Verses"), a poem which the scald Sighvatr addressed to Óláfr's son.[101] The poem was occasioned by the king's bitter conflict with the farmers. The scald was trying to mediate between the two parties. He spoke of the reasons that were leading the farmers to rise against their king:

> hafa kveðask lög nema ljúgi
> landherr búendr verri
> endr í Ulfasundum
> önnur enn þú hétsk mönnum.[102]

> "Unless the retainers lie, the farmers say they have worse law, different than you promised to the people earlier in Ulvesund."

To judge from other passages in Sighvatr's poem, the "worse law" (*verri lög*) he was referring to had nothing to do with legislation as such. It was rather some general principles that Magnús had promised to follow in his dealings with the subjects but from which he was presently departing. The scald vividly described the situation in which the farmers found themselves as a result of that: "Who urges you to slay the stock of battle-brave men? It is folly for a king to do [this] in his own country… Your troops are tired of looting (*rán*)."[103] The "worse law" in question was actually lawlessness.

Sighvatr contrasted the way Magnús and his men were behaving with the ideal of kingship that the great rulers of the past embodied. Whereas Magnús' men were engaged in plunder, his predecessor Hákon góði punished crime and maintained law in the country:

> hét sás fell á Fitjum
> fjölgegn ok réð hegna
> heiptar rán en honum
> Hákunn firar unnu
> þjóð helt fast á fóstra
> fjölblíðs lögum síðan
> enn eru af því minni
> Aðalsteins búendr seinir.[104]

[101] On this poem see Finnur Jónsson, *Lit. hist*. 1:591–94, and most recently the stimulative discussion by Marianne Ustvedt, *Af tungu fram: Sigvat Tordssons Bergsoglisvísur som skaldisk realisme og poetisk propaganda*, unpubl. diss. (University of Oslo, 1997), who also provides a critical edition of the text.
[102] Skjd. 1B:236; Ustvedt, *Af tungu fram*, pp. 64–65, 86, 97.
[103] Skjd. 1B: 237; Ustvedt, *Af tungu fram*, pp. 66–67, 87–88, 97.
[104] Skjd. 1B: 235; Ustvedt, *Af tungu fram*, pp. 57–58, 83–84, 96.

> "Hákon who fell at Fitjar, was called very just: he curbed hostile pillage and people loved him. The people have since stuck to the law of Aðalstein's most friendly foster son; the farmers are still slow [to abandon] this memory."

By analogy with the use of the word *lög* in the stanza we quoted above, it would appear that the "law" of Hákon, whose example Magnús was urged to follow, had an equally broad meaning of standards of justice and lawfulness kept up by the king. There is nothing in the verse to suggest that the scald was referring to a particular body of legislation that had given Hákon his reputation of being *fjölgegn* "very just, fair, upright".

Sighvatr was carrying on with contrasts: "One matter the farmers speak about is especially grave: 'my lord [King Magnús] appropriated (?) men's ancestral farmlands (*lá sín eign á óðal þegna*)'."[105] That was not the way kings like Óláfr Tryggvason and Óláfr Haraldsson, Magnús' father, acted:

> rétt hykk kjósa knáttu
> karlfolk ok svá jarla
> af því at eignum lofða
> Óláfar frið gáfu

> "I believe that both farmers and jarls chose rightly, because the [two] Óláfrs brought peace to people's properties."

And again, the word *lög*, "law", makes an appearance in the verse:

> Haralds arfi lét halda
> hvardyggr ok son Tryggva
> lög þaus lýðar þágu
> laukjöfn at þeim nöfnum.[106]

> "Haraldr's always constant heir and Tryggvi's (always constant) son upheld the most just law that men received from the [two] namesakes."

Is it the two king's fame of legislators Sighvatr was referring to here, as most modern historians including Blom and Helle suppose?[107] Scarcely, considering the general ideological agenda expressed in *Bersöglisvísur* and the concrete political circumstances in which the poem originated. The message Sighvatr was trying his best to get across was that Magnús could not go on setting himself above the law; he ought to pay heed to what the farmers wanted (*hlýðið ... til hvat búmenn vilja*);[108] he was expected to protect the peace and people's properties from plunderers instead of harrying in his own country. What the scald says about the law that Óláfr Haraldsson gave to the people should be understood against this

[105] Skjd. 1B: 238; Ustvedt, *Af tungu fram*, pp. 71–72, 92–93, 98.
[106] Skjd. 1B:235; Ustvedt, *Af tungu fram*, pp. 58–59, 85, 96.
[107] Blom, "St. Olavs lov," pp. 64–65; Knut Helle, "Rettsoppfatninger og rettsendringer," p. 58.
[108] Skjd. 1B: 237; Ustvedt, *Af tungu fram*, pp. 65–66, 89–91, 97.

background. The question of whether or not Óláfr legislated, was simply irrelevant in this context.

Sighvatr was an experienced and far-travelled man. He saw the English court of King Knútr, the model royal court in Northern Europe of his day. He may well have been familiar with the idea that a good king ought to give laws to his subjects. But it is significant that when Sighvatr himself spoke about laws he lay emphasis not on the king's power to create laws but on his duty to maintain legality and equity in the society. Everyone should be given his due:

> Lát auman nú njóta,
> Nóregs, ok gef stórum,
> (mál halt) svá sem sælan,
> sinjór, laga þinna.[109]

> "Signor of Norway, let the poor just like the rich now benefit from your laws, and give generously. Keep your word."

The same idea played a prominent part in the self-representation of Knútr's monarchy, and we may suspect that it was an influence from these quarters that was reflected in Sighvatr's words. The parallels are striking. In 1027, while on a journey to Rome, Knútr was addressing his subjects in a letter which contained a veritable programme of the country's governance:

> I command also all the sheriffs and reeves over my whole kingdom, as they wish to retain my friendship and their own safety, that they employ no unjust force against any man, neither rich nor poor, but that all men, of noble or humble birth, rich or poor, shall have the right to enjoy just law (*omnibus tam nobilibus quam ignobilibus et diuuitibus et pauperibus sit fas iusta lege potiundi*).[110]

From this point of view, it was ultimately unimportant whether a king was a legislator; what mattered was that he ought to use his strength in suppressing injustice and see to it that the laws were always respected.

Medieval Icelandic men of letters had immense knowledge and genuine appreciation of verse by viking-age scalds, but to them, it was, above all, a valuable source of information about past events. The ideological agenda of Sighvatr's poetry had little significance from their perspective. Seeking for the facts behind poetic allusions, they visualized the law the scald had been speaking of as codes of laws enacted by the great kings of the past. Snorri is a vivid example in this respect. He takes Sighvatr's utterances for an affirmation to the effect

[109] The addressee of this stanza, preserved only in Snorri's *Edda*, is unknown. Finnur Jónsson includes it in his edition of *Bersöglisvísur* in Skjd. 1B: 238; transl. Anthony Faulkes in Snorri Sturluson, *Edda* (London: Everyman, 1987), pp. 146, 150.

[110] *Cnut's letter of 1027* 12, ed. F. Liebermann in *Die Gesetze der Angelsachsen* 1: 277; transl. in *English Historical Documents*, vol. 1, *c. 500–1042*, ed. Dorothy Whitelock, 2nd ed. (London: Methuen, 1979) no. 53, p. 478.

that Hákon Aðalsteinsfóstri "laid great stress on legislation (*lagasetning*)," and although for reasons of his own Snorri does not present Óláfr Tryggvason as a legislator in his account of this king's reign, he further reports that at his election to the throne Óláfr Haraldsson had promised to maintain the rights and laws such as his namesake had given to the farmers.[111] Of particular interest is his report of Ólafr Haraldsson's lawmaking activities. Snorri says:

> He had often recited in his presence the laws which Hákon Aðalsteinsfóstri had given to the Trondheim District. He changed laws (*skipaði lögum*) with the advice of the wisest men, taking away or adding as seemed best to him (*tók af eða lagði til, þar er honum sýndisk þat*). The Christian code of laws he gave in accordance with the advice of Bishop Grímkell and other priests, laying great stress on abolishing heathendom and ancient practices such as seemed to him contrary to the spirit of Christianity. In the end the farmers agreed to the laws the king gave.[112]

How did Snorri get the idea that Óláfr made use of Hákon's legislation? The fact that the two kings were juxtaposed in his source, Sighvatr, provides only a partial explanation. Also, he may have remembered what the author of *Fagrskinna* said about Hákon's lawgiving: "He established laws over all Norway with the advice of Þorleifr spaki and other wise men, and King Óláfr the Saint took use of most of these laws."[113] However, the most important influence seems to have come from afar. Snorri's phrase "tók af eða lagði til, þar er honum sýndisk þat" points to an influence of a *topos* of "renovation" and "emendation" of the laws that had a long tradition. A century before the writer of *Heimskringla* another Icelandic man of letters, Ari Þorgilsson, described in similar expressions how the first body of laws, *Ulfljótslög*, was imported to the country from Norway:

> And when Iceland had been widely settled, a Norwegian named Ulfljótr for the first time brought here law from Norway … and this was called Ulfljótr's law … And this [law] was primarily modelled upon the Gulaþing law of that time and [adapted] on the advice of Þorleifr

[111] See *Hkr (Hákgóð)* 11 and *Hkr (Ólhelg)* 38 and 40, ed. Bjarni Aðalbjarnarson 1: 163 and 2: 50, 51. In the last cited passage Snorri also mentions that Óláfr Haraldsson offered the farmers the peace (*friðr*) which Óláfr Tryggvason had offered to them before him, and this may be a reminiscence from *Bersöglisvísur*, too.

[112] *Ólhelg (Sep)* 43, ed. Johnsen and Jón Helgason, p. 104; *Hkr (Ólhelg)* 58, ed. Bjarni Aðalbjarnarson 3: 73; transl. Lee M. Hollander in Snorri Sturluson, *Heimskringla, History of the Kings of Norway* (Austin: University of Texas Press, 1964), p. 289.

[113] *Fagrskinna – Nóregs konunga tal* 9, ed. Bjarni Einarsson, Íslenzk fornrit, vol. 29 (Rekjavik: Hið Íslenzka fornritafélag, 1985; hereafter *Fsk*), p. 80. Gustav Indrebø, *Fagrskinna*, Avhandlinger fra Universitetets historiske seminar, vol. 4 (Kristiania: Grøndahl, 1917), p. 136, suggests that the story was made up by the author of *Fagrskinna*. That Snorri introduces the account of Óláfr's legislation at that stage of his narrative when his protagonist has just become the sole ruler of the country might also indicate the influence of *Fsk* 31, ed. Bjarni Einarson, p. 181. On the relationship between *Fagrskinna* and *Heimskringla* see Bjarni Aðalbjarnarson, *Om de norske kongers sagaer*, Skrifter utg. av Det Norske Videnskaps-Akademi i Oslo, II. Hist.-Filos. Kl., 1936, no. 4 (Oslo: Dybwad, 1937), pp. 173–236.

spaki, the son of Hörða-Kári, as to what one should add, or subtract, or provide differently (*hvar við skyldi auka eða af nema eða annan veg setja*).[114]

But the ultimate of this *topos* was Justinian's Novel 7 in which the Roman emperor declared his intention to make a single law covering the subject, "which would renew and emend all previous [laws], and add what was lacking and cut away what was superfluous (*quod deest adiciat et quod superfluum est abscidat*)."[115] Thus, the intellectual experience of the Icelandic age of learning made it possible for literate saga authors to read into Sighvatr's verse new meanings and interpret it as a kind of treatise on the history of royal legislation in viking-age Norway.

Retracing our steps to the question that we put at the beginning – when did the notion of the "laws of St Óláfr" emerge – we see that there is no reason to assume that Óláfr's legislative ambitions had much prominence in his contemporaries' image of him and that the memory of his legislative effort provided a natural point of departure for the subsequent growth of the legend. Rather the roots of this legend seem to lie in the period following Óláfr's death in the battle of Stiklestad. At that time the country came under the Danish rule, and the new governors were determined to impose on their subjects a heavier burden of public service, severer penalties for violence, and new forms of taxation. The Danish regime soon collapsed, but its legacy, the "laws of Álfífa", persisted, at least in some part, for another hundred odd years. This situation could not but prompt comparisons with the good old days, with the time when Óláfr, venerated now as a saint, reigned in Norway. We find such allusions to the "days of Óláfr" in a number of articles in *Frostuþingsbók*, a provincial collection of laws which is only preserved in its complete form in a version from 1260s, but much of its content dates back to earlier times.

In the Days of King Óláfr the Saint, or Fish and Ideology in Frostuþingsbók

The late-twelfth-century Norwegian chronicle *Ágrip af Nóregskonunga sögum* describes in some detail the new laws that the Danish rulers, King Sveinn and his mother Álfífa (Ælfgyfu), instituted in the country:

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[114] *Íslendingabók* 2, ed. Jakob Benediktsson, Íslenzk fornrit, vol. 1 (Reykjavik: Hið íslenzka fornritafélag, 1968), pp. 6–7. Sigurður Líndal, "Sendiför Ulfljóts, Ásamt nokkrum athugasemdum um landnám Ingólfs Arnarson," *Skírnir* 143 (1969) 5–26, gives good reasons for supposing that the whole story was a learned construction. However, the relevance of the "renovation" *topos* has escaped his notice.

[115] Justinian, Nov. 7 pr. Further we will have an occasion to take a closer look at this motif and its development in medieval Norway, see below, pp. 66–67.

> At Yule each farmer was to give the king a measure of malt for each hearth, a ham from a three-year-old ox – this was called a 'bit of the meadow' (*vinar toddi* = *vinjar toddi*) – and a measure of butter; and each housewife should supply a 'lady's tow' (*rykkjartó* = *rýgjartó*) – that was as much clean flax as could be clasped between thumb and middle finger. […] Each man who went fishing was to pay the king a 'land bundle' (*landvarða*) from wherever he put out, and this was five fish. […] These obligations remained until Sigurðr Jórsalafari and his brothers abolished most of these impositions.[116]

Norwegian collections of laws also record the abolishment of a number of these duties. In *Gulaþingsbók* the provision in question is attributed to kings Magnús góði and Hákon Þóris fóstri Magnússon,[117] but in *Frostuþingsbók* the corresponding ordinances figure as *réttarbœtr* given individually to the Þrœndir, the Háleygjar, and the Naumdœlir by kings Sigurðr, Eysteinn, and Óláfr presumably sometime before 1107.[118]

Among these provisions it is the *réttarbót* to the people of Hålogaland which presents particular interest from the point of view of the prehistory of the "laws of St Óláfr". The article opens with a declaration to the effect that the kings remit all taxes on fishing (*fiskigjafir*), an except being made for the fisheries in Vágar on Lofoten: those who fish there are to pay five fish as before.[119] Other payments remitted are briefly mentioned: the "malt measure" (*reykmœlir*), the "lady's tow" (*rýgjartó*), and the "meadow tail" (*vinjarspönn*). After that follows a statement concerning commons, that is, all uncultivated tracts of land such as waste, wood, and waterfront, to which no individual can claim an exclusive right:

> Also they [King Sigurðr and his brothers] have allowed them [the Háleygjar] to have the commons (*almenningar*) as they had them in the days of Óláfr the Saint, both the outer [*i.e.*, those to the sea] and the upper [commons, *i.e.*, within the land] to the south and to the north.[120]

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[116] *Ágrip af Nóregskonunga sögum* 29, ed. Bjarni Einarsson in Íslenzk fornrit, vol. 29 (Reykjavik: Hið Íslenzka fornritafélag, 1985; hereafter *Ágrip*), pp. 28–29; transl. Matthew Driscoll in *Ágrip af Nóregs konungasögum, A Twelfth-Century Synoptic History of the Kings of Norway*, Viking Society for Northern Research, Text Series, vol. 10 (London: Viking Society for Northern Research, 1995), pp. 41–43. Cf. *Ólhelg (Leg)* 71, ed. Johnsen, p. 73; *Hkr (Ólhelg)* 239, ed. Bjarni Aðalbjarnarson 3: 399–400. On the "laws of Álfífa" see particularly Johannes C. H. R. Steenstrup, *Normannerne*, 4 vols. (Copenhagen: Klein, 1876–82) 3: 383–90; Gustav Indrebø, "Ågrip," *Edda* 17 (1922) 43–45.

[117] G 148, ed. Keyser and Munch in NgL 1: 58–59.

[118] F 16.1–3, ed. Keyser and Munch in NgL 1: 257–58.

[119] This exception probably had a connection with the economic importance of these fisheries, but the fact that the kings provided the fishermen there with, so to speak, special facilities might have played a role, too, cf. Eysteinn Magnússon's words in *Morkinskinna*, ed. Finnur Jónsson, Samfund til Udgivelse af Gammel Nordisk Litteratur, vol. 53 (Copenhagen: Jørgensen, 1932; hereafter *Msk*), p. 384: "I established a shelter for fishermen north in Vágar so that poor men could have aid and subsistence. I also had a church built there and established a parsonage."

[120] F 16.2, ed. Keyser and Munch in NgL 1: 257–58: "Þessa réttarbót hafa konungar gefit Háleygium öllum. þat eru fiskigiafir allar bæði af nesium öllum oc af öllum fiskistöðum. fyrir utan þat er menn hafa gefit konungi .v. fisca. þat scal hverr maðr fá er í fisci er í Vágum. reycmæla oc rygiar tó oc viniar spönn. Hafa þeir oc gefit almenninga alla slíca sem þeir höfðu um hins helga Ólafs daga. bæði hit ytra oc hit öfra. sunnarla oc norðarla. En klóvöru alla fyrir norðan Umeyiarsund. þar á konungr einn caup á …"; transl. Laurence M. Larson in *The*

Although the connection between individual clauses within the article should have been readily understandable for the original audience, to the modern reader it may appear somewhat obscure.

One might assume that the section about commons forms an individual provision, distinct from the abolishment of the tributes, and that the article actually contains two separate *réttarbœtr*, one remitting the payments, the other allowing the Háleygjar to use of the commons. In this case we face the problem of explaining just which specific claims to the common the kings waive and why they should do it only in respect of Hålogaland.

We may try to approach the problem from a different angle. There seems to be a connection between the fact that the kings remit the five-fish tribute and the declaration that the Háleygjar can henceforth have their outer commons "as they had them in the days of Óláfr the Saint". The "fish tribute" (*fiskigjafir*) remitted by the *réttarbót* was taken "both from all the headlands and from all the fishingsteads (*fiskistöðvar*)". The sagas also indicate that the *landvarða*, which is apparently the same thing as the *fiskigjafir*, was to be paid by everyone who went fishing "from wherever he put out". This formulation is not very clear but it seems to imply that not fishing as such but the use of places along the coast either as shelter for the night or for storage of the catch was liable to the tax. For the most part, such places were no man's land and constituted the "outer" commons mentioned in the *Frostuþingsbók* article. It is well conceivable then that the fish tribute introduced under the Danish rule was conceived as an infringement on people's right to their commons and, by implication, the remittance of the tribute could easily be presented as "restitution" of the "outer" commons. In this case it is also understandable why the question of the commons surfaces only in this article: since the tax on fishing is not mentioned in the neighbouring articles,[121] neither are the commons.

In fact, the clause in question specifies that both this and the other kind of the common were given back, namely the one comprising waste, wood, and plateau lands (*hit œfra*). What lies behind these words, is not very clear. However, we are perhaps justified in assuming that there is some link between this and the stipulation that follows, which reserves the king's right to purchase fur. Indeed, a reservation of this kind can only conceivably be included in one article with a set of *réttarbœtr* if it corresponds directly with one of them, as the case is with the five fish tax on Lofoten in first section. Now the text as it stands does not expressly mention abolishment of any tax on (fur) hunt analogous to the five-fish tax, nor is such a tax

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Earliest Norwegian Laws Being the Gulathing Law and the Frostathing Law, Records of Civilization, vol. 20 (New York: Columbia Univiversity Press, 1935), p. 405.

[121] Apparently, because only in Hålogaland the question was of major economic significance and the tax at issue may never have been introduced in other places within Frostuþing jurisdiction.

known from other sources, but we may speculate that some arrangement giving (fur) hunt a freer rein was made on the occasion, to which the statement of the king's purchase rights formed a counterbalancing complement and which stood for a "return" of the common.

By abolishing provisions introduced under the Danish rule, King Sigurðr and his brothers were ostensibly restoring the legal order as it had been in the "days of St Óláfr". This notion proved prone to develop ideologically charged connotations. The legal status of the "days of St Óláfr", or what it was thought to have been, became a reference point with which usages and customs of the day could be compared and judged.

A reference to the "days of King Óláfr the Saint" also makes an appearance in another article of *Frostuþingsbok* that treats the law of waters. It provides that some rivers should always be laid open while others can be fenced under certain conditions:

> If a man owns the land on both sides of a stream that cannot be used for floating timbers [*or* for transportation], he may throw a fence across it, if he wishes to do so; but if those who live higher up the stream shall protest that this was not done in the days of Óláfr the Saint, let them proceed to place a ban and to appoint a five-day moot; and let the man who built the fence be allowed to present his witnesses.[122]

Despite the peculiar terminology used in the article, the classification envisaged here seems essentially clear: an unconditional prohibition applies to the principal rivers that fall into the sea but one can in principle block a tributary.[123] The reason for this differentiation is probably, on the one hand, that tributaries in Trøndelag are for the most part not suitable for transportation and, on the other, that salmon, the main species fished by means of a dam, does not go far upstream in the tributaries and consequently fencing them is in most cases unlikely to harm the owners who live higher up the river. Still the latter have a right to demand that the fence be removed saying that "this was not practiced in the days of Óláfr the Saint," and the burden of proof to the contrary will lie with the owner of the fence.

The arrangement stipulated here must be very old in the essential. The prohibition of fencing bigger rivers was in force at least as early as in the ninth century since the organization of the coastal regions into levy districts (*skipreiður*) "as far inland as the salmon

[122] F 13.9, ed. Keyser and Munch in NgL 1: 243: "En um ár allar er eigi eru flotrennar. þá scal þar gerða yfir ef vill. oc á hann iörð báðum megin til. En ef þeir er fyrir ofan sitia segia at eigi var svá gört um daga Ólafs hins helga. þá fari þeir til oc festi lög fyrir oc leggi fimtarstemnu oc nióti sá vitnis síns er gerði"; transl. Larson p. 381.
[123] For this and what follows see: U. A. Motzfeldt, *Den norske vasdragsrets historie indtil aaret 1800*, Avhandlinger utg. ved Det juridiske fakultet, Kristiania, no. 1 (Kristiania: Brøgger, 1908), pp. 53–56.

goes upstream" clearly implied it;[124] at the same time, nothing indicates that a parallel prohibition concerned minor rivers.[125] That the rules were on the whole the same in the "days of St Óláfr," is most likely.

A concern that no one should make changes on the river at the expense of his neighbours, which is evident in this article of *Frostuþingsbók*, is equally emphasized in *Gulaþingsbók*: "Everyone shall have the pools (*uatn*) and the fishing grounds (*veiðistoð*) that he had in former times (*at fyrnsku haft*)", and: "No one shall damage another man's fishing place (*veiði stoð*) or forbid him the use of it, if it has belong to him formerly (*at forno fare*)".[126]

The seemingly greater precision of the stipulation in *Frostuþingsbók* (not just *at fyrnsku* or *at forno fare* but specifically *um daga Ólafs hins helga*) could hardly have made much difference in practice. Not that it was in itself impossible to furnish evidence of the events which took place in the neighbourhood some two hundred years before, but there was apparently no need to recall the past as distant as the "days of Óláfr the Saint" if a conflict arose: the point at issue was whether anyone suffered losses as a result of fencing the river downstream, and if this was the case, the injured party must have reacted immediately.

It is interesting to note that in the surviving documentary material there is an example of a conflict over fishing rights when an appeal to the "days of St Óláfr" was actually made. Significantly, it appears to have played but a minor role in the judicial settlement as such. The course of events can be reconstructed on the basis of a letter of protection issued on the occasion by Bishop Ivar skjálgi of Hamar (d. 1221).[127] The inhabitants of Garmo farm in

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[124] *Hkr (Hákgóð)* 20, ed. Bjarni Aðalbjarnarson 1: 175–76: "Hákon konungr [setti] þat í lögum um alt land með sjá ok svá langt upp á land sem lax gengr upp ofast, at hann skipaði allri byggð ok skipti í skipreiður, en hann skipti skipreiðum í fylki." Cf. Motzfeldt, *Den norske vasdragsrets historie*, pp. 21–24, 124.

[125] Motzfeldt, *Den norske vasdragsrets historie*, pp. 24–30.

[126] G 93 and 85, ed. Keyser and Munch in NgL 1: 45, 42; transl. Larson, pp. 103, 96.

[127] Dipl Norv 2 no. 4: "Ollum guðs vinum ok sinum þæim sem þetta bref sea æder hœyra verandom ok vider komandom. sendir Jfwer biscup quædiu guðs ok sinæ. sia hærmingh var aat hofuud kirkiu a Lom firir mer Þorgæiri ærkidiakne Þore loghmanne Simone kapalin Atla preste Paale j Bœiom Æiriki vnga Gunnare bior Birni bratta (ok) morghum odrum godom monnum lærdom ok olærdom at þa er hin hælghi Olafuer konongr kom kristni aa Loar þa gaf han Þorgæiri gamlæ a Garmoe vatn þat er Þessir hæitir ok ollu hans afspringhi. en han snerez sidan till truar ok het þui sem han let gera kirkiu a bœ sinom. ok baroz hær æftir twæggiæ manna vithni þeira hinna ællzto j Varlldale at swa hermdo fæder þeira ok forælldri firir þæim ok swa var satt. Ok þa ænn aðr er a gango men gerdoz till þa gerdo þeir þæim till a alþinghi vatta stæfnu till vazsens ok komo þesser j stæfnu dagh rettan en æighi hinir leto þeir þa læida stæfnu vithni sin. en sidan leto þæir bera fyrnu vitni sin sua at þeir hafdo radet þriatighu vettra budar vallum sinum bode ok banne a netrostom sinum ok netloghum ok ollum jværka vkuidiat ok vbannat firir huærium manne. Ok sætto þæir tollf manna dom æftir ok twa hœyringia ok leto *dœme karle ok kononge ok huærium manne logh en ser handa værk sin oll. ok sagde sua loghmader at þa var allt retlægha ok engi komo anduitni j mote. En Kristkirkia j Hamre ok margher adrer hælghir stader æigho þær æighner j. Nu lægh ek þær allar æighnir ok vatn þat j guðs hæghnad ok allra hæilaghra manna. firir *bidod ek huærium manne rikum ok orikum a þa at ganga. en ef þeir ero nockrer er a ganga þa lægh ek þæim vider bann guðs ok hæilaghra manna pauens ok ærkibiscupsens ok allra annara biscupa. en guðs miskun þæim ollum sem þetta hallda væll." The translation in *Norske middelalderdokumenter*, ed. Sverre Bagge *et al*. (Bergen:

Gudbrandsdalen whose names are not specified had a fishery with some appurtenances on the mountain lake Tesse a few miles away. Rival claims to this property were put forward, but the identity of the claimants is not clear from the text. Then the people of Garmo sought to secure their rights and summoned their opponents to a local thing. When the latter failed to show up there, witnesses were produced who testified that the people of Garmo had observed all due formalities. Afterwards another sort of witnesses (*fyrndarvitni*) were presented before the judicial assembly and they testified that the people of Garmo had possessed the disputed property for the previous thirty years and no one had made any objections to it during that term.[128] Once this had been established and no witnesses to the contrary had been presented, the case was decided in favour of the people of Garmo. It was apparently at a later stage, when the bishop came to the district, that the people of Garmo took a further step to secure their rights and asked the bishop to give them a letter of protection. On this occasion two oldest men of the neighbourhood were present and they told that, according to what their fathers had told, St Óláfr had given Tesse lake to some Torgeir gamli and all his kin (to which the people of Garmo presumably belonged) when he baptized this part of the country. It is not very clear why this story had not been made use of in the legal proceedings proper, and we may only speculate that it would not have been especially helpful at that moment because the claims to the whole lake had been long out of question since, as we gather from the document, it was divided between several owners. In any event, it is clear that the situation as it was in the "days of St Óláfr" did not matter much for the judicial settlement of the conflict.

And yet, however little the bearing of this precision may have been for settlement of routine conflicts on the rivers of Trøndelag, the clause sheds light on the attitude which its author and his audience evidently shared: the reign of the saint king is envisaged here as the time when justice and equity prevailed in all matters. This idea must have played a crucial role in the construction of St Óláfr's image as "the founder of all legal order" and his laws as "the genuine palladium of popular freedom", to cite Konrad Maurer's expression.[129]

Universitetsforlaget, 1973), no. 17, p. 78–80, and the summary in Reg Norv 1 no. 439, put a construction on the events that differs from the one suggested here.

[128] Norms of canon law governing prescription were apparently applied in this case. Prescription meant acquisition of a title or right to property by uninterrupted, unchallenged, and peaceful possession in good faith over a variable, long or short, period of time as defined by law. The legal notion of prescription had capital importance in canon law and Gratian in his decretum devoted to it a whole section on which naturally the decretists commented over and over again. The passages on prescription collected by Gratina are found, with few exceptions, already in the works of Ivo of Chartres and others. Gratian discussed the terms required in different circumstances (10, 20, 30, and 40 years) in C. 16 q. 3 d.a.c. 16. See further R. H. Helmholz, *The Spirit of Classical Canon Law* (Athens, GA: The University of Georgia Press, 1996), pp. 174–99.

[129] Maurer, "Die Entstehungszeit der ælteren Gulaþingslög," p. 106.

This image makes an appearance in full glamour on yet another occasion in *Frostuþingsbók*. This time it serves to add weight to the rule that barons (*lenðir menn*) must participate in the naval levy equally with the farmers:

> The barons shall contribute to the levy. Barons shall contribute to the levy just as other freemen do and have such a share in the levy ships as [the rule was] in Óláfr's day; and they shall pay dues for every male person who is six winters old or older than seven winters.[130]

The point at issue was probably that the aristocracy was involved in the military organization both as members of the king's retinue (*hirð*) and as participants in the expenses that the farmers had to bear in connection with the levy. As the levy obligations were gradually transformed into a tax beginning in the late twelfth century, a discontent with this double burden must have arisen among the aristocracy but it did not result in a legally established class privilege until the 1270s.[131] It is evidently against this background that the stipulation in question should be seen.

The farmers had a vested interest in the aristocracy's participation in the levy because the expenses were distributed at this time on the district principle and the larger number of people withdrew the heavier was the burden on the rest.[132] They must have felt a potential threat to their rights and wished to secure their situation by an appeal to the just order of the "days of St Óláfr". This article of the law-book seems like a particularly clear example of a reference to the "good old law" channelling the popular sentiment.

Þetta réttarbót gaf Haralldr konungr oc Magnús: *The Elusive Identity of Two Prominent Figures in the History of the "Laws of St Óláfr"*

There is a broad consensus among scholars that the early Norwegian collections of law contain material of diverse date and provenance, although as a rule it is hard to find a clue to sorting out and dating different layers in the wording of individual clauses. A few instances in

[130] F 7. 18, ed. Keyser and Munch in NgL 1: 202: "At lendir menn gere leiðangr. Svá sculu lendir menn gera leiðangr sem elli hverr búanda. oc slíct eiga í leiðangrs scipum sem var um Ólafs daga oc gera fyrir hvern mann er .vj. vetra er gamall eða .vij. vetrum ellre."
[131] Edvard Bull, *Leding, Militær- og finansforfatning i Norge i ældre tid* (Kristiania and Copenhagen: Steen, 1920), pp. 100–5; Grethe Authén Blom, *Kongemakt og privilegier i Norge inntil 1387* (Oslo, Bergen, and Tromsø: Universitetsforlag, 1967), pp. 267–82.
[132] Blom, *Kongemakt*, pp. 273–74.

which a given provision is associated explicitly with a named person form a seeming exception in this respect. This is just the case in the article 16.4 of *Frostuþingsbók*:

> Concerning *réttarbœtr*. King Haraldr and Magnús gave this *rétarbót* to the Þrœndir and all men of the [same] jurisdiction. The laws that Holy King Óláfr gave and established and all the [subsequent] *réttarbœtr* that their kinsmen – those who presided as kings over the country – have given since shall be observed.[133]

The identity of the two gentlemen mentioned as the initiators of this provision does not seem to raise any doubts for most modern commentators. In *Regesta Norvegica* the *réttarbót* is attributed to Haraldr Gilli and Magnús blindi and dated approximately to 1130–1134; surprisingly, no other options are mentioned.[134] Dissentient opinions have, however, been voiced: Konrad Maurer made out a case for Haraldr harðráði and Magnús góði[135] and Per Sveaas Andersen seems to attribute the article to Haraldr harðráði and Magnús berfœttr.[136] Thus, all possible combinations of royal Haraldrs and Magnúses have been suggested. It seems, however, that the problems raised by this article are not limited to just this question.

Indeed, both the form and the precise legal meaning of the text spark awkward questions. The article in question is labelled as a *réttarbót* in the version of *Frostuþingsbók* from the 1260s. The same collection includes a few other clauses that are referred to in the same way, and their comparison with F 16.4 may be instructive for understanding the meaning implied in the term.

First of all, the same section 16 includes a set of *réttarbœtr*, which are attributed there to Kings Sigurðr, Eysteinn, and Óláfr.[137] It is apparently these *réttarbœtr* that *Ágrip* and other sagas tell about and present as the abolishment of the provisions introduced in Norway under King Sveinn and his mother Ælfgifu / Álfífa. Many of the payments to the crown and royal prerogatives that the kings renounce in the clauses of *Frostuþingsbók* correspond directly to the saga accounts of the "laws of Álfífa", and nothing precludes one from seeing other provisions in this light too.[138] What these provisions have in common is that all of them aim at

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[133] F 16. 4, ed. Keyser and Munch in NgL 1: 258: "Um réttarbœtr. Þetta réttarbót gaf Haralldr konungr oc Magnús Þrœndum oc öllum lögunautum. Lög þau er hinn helgi Ólafr konungr gaf oc setti. oc réttarbót þau alla er frændr þeirra hafa síðan gefit. þeir sem konungar hafa at landi setit. þá scal halldaz."
[134] Reg Norv 1 no. 77. See also *Norske middelalderdokumenter*, no. 5, p. 22.
[135] Konrad Maurer, "Die Entstehungszeit der älteren Frostuþingslög," in *Abhandlungen der philosophisch-philologischen Classe der königlich bayerischen Akademie der Wissenschaften*, vol. 13, pt. 3 (Munich: Verlag der Akademie, 1875), p. 64.
[136] Per Sveaas Andersen, *Samlingen av Norge*, p. 145.
[137] F 16.1–3, ed. Keyser and Munch in NgL 1: 257–58.
[138] See above, pp. 32–35.

improving, in one way or another, the subjects' legal standing, their *réttr*,[139] and it is obviously in this sense that they are termed as *réttarbœtr*.

A survey of occurrences of the word in contemporary legal sources and in the sagas seems to support this interpretation. In *Gulaþingsbók* the term refers to Kings Magnús góði and Hákon Þóris fóstri Magnússon's abolishment of the same payments to the crown and royal prerogatives as in F 16.1–3, though the list is less extensive here.[140] In the sagas, royal *réttarbœtr* are mentioned occasionally but for the most part without specifying what they consisted in. The saga authors go into some detail only in the case of the above-mentioned *réttarbót* of Hákon Magnússon and the one granted by Óláfr Haraldsson to the Upplanders with respect to the levy, taxes, and questions of governance.[141] Without attempting at a comprehensive definition, we may note that all the *réttarbœtr* discussed so far regulate the subjects' obligations towards the king, purport to improve the subjects' legal position, and usually imply a waiver of certain rights on the part of the king.

If we take a look now at F 16.4, a question arises: how to bring it in line with the other *réttarbœtr*? In this provision, it is not so much the legal position, the rights, or the obligations, of the king's subjects as the legal order in general that appears to be the matter of concern: "The laws that Holy King Óláfr gave and established and all the [subsequent] *réttarbœtr* … shall be observed".

It has been suggested that this clause was meant to give royal *réttarbœtr* the status of law, which they had supposedly lacked previously, and thus to secure the subjects' legal position against an eventual withdrawal of rights once granted.[142] The assumptions underlying this interpretation deserve closer examination.

The view that *réttarbœtr* were originally valid only for the term of the reign of the king who gave them is based on the authority of a saga account of a conflict between King Haraldr harðráði and the Upplanders. When in an attempt to vindicate their legal advantages over people elsewhere in Norway, local farmers cited the *réttarbót*, which King Óláfr had given them, the king took it badly "because he wanted all the Norwegians to have the same status

[139] For examples of this usage of the term see *Ágrip* 9 and 45, ed. Bjarni Einarsson, pp. 13, 42: "Haraldr [gráfeldr] … gørði harðan rétt landsmanna ok þeir allir brœðr"; "Þá nam Hákon [fóstri Steigar-Þóris] af jólagjafar ok skyldir allar ok landaura gjald við Þrœndi ok við Upplendinga alla, þá er við hónum tóku, ok bœtti þar í mót mörgu öðru rétt landsmanna."

[140] See G 148, ed. Keyser and Munch in NgL 1:58–59.

[141] *Msk*, ed. Finnur Jónsson, p. 187: "tolldu þeir at O. konungr en helgi hefði gefit þeim rettar bętr imaurgo lagi fyr avþrom maunnom beþi um scylldir oc utgorðir oc maurg land raþ undir beenðr [mælt] er [eigi] ero annars [staðar] iNoregi." Cf. *Fsk* 57, ed. Bjarni Einarsson, p. 271.

[142] Absalon Taranger, "De norske folkelovbøker," *Tidsskrift for Rettsvidenskap* 39 (1926) 192, 202 and *Tidskrift for Rettsvidenskap* 41 (1928) 50, 53; Grethe Authén Blom, "Retterbot," in KLNM 14 (1969), col. 109.

(*réttr*)", and the end of it was that Haraldr resorted to force. "After that the farmers gave in and maintained the laws at the king's injunction and obeyed all his commands."[143] There is no indication here that the *réttarbót* had no legal validity since King Óláfr was dead; rather the point seems to be that no *réttarbót* is of any efficacy if the king is determined to get his own way.

Further, we may gather from the evidence that the same *réttarbót* was sometimes given on more than one occasion. It seems to have been the case with the *réttarbœtr* attributed in *Frostuþingsbók* to King Sigurðr and his brothers. According to the sagas, King Hákon Magnússon had already made the same provisions, or at least part of them, for the benefit of the Þrœndir in the winter of 1103–1104.[144] This is not, however, to say that these *réttarbœtr* lost their legal force in the years that intervened or that a special act of renewal on the part of the king was necessary to validate them. Rather, confirmation of old and bestowal of new *réttarbœtr* gave the king ample opportunity to display the exercise of power.

All in all, foundations of the legal authority of the *réttarbœtr* may not have been clear-cut enough and opinions may have differed on whether a particular *réttarbót* remained binding for the king who had not expressly consented to it, and yet there is clearly no reason to assume that the *réttarbœtr* were just temporary provisions at first and that some Kings Haraldr and Magnús sought then to change the situation drastically by issuing another *réttarbót*.

Finally, the clause in question concerns not only *réttarbœtr*, but first and foremost "all the laws that Holy King Óláfr gave and established". From the perspective of the suggested theory, it must indeed seem strange that a *réttarbót* should be issued in order to validate laws.

The stipulation that the "laws of St Óláfr" be observed, with the apparent imputation that they were recently abused, bears an uncanny resemblance to the language of King Hákon Hákonarson's statute of 1260 opening the extant version of *Frostuþingsbók*. It is easy to see the compositional effect resulting from placing these two statements of the royal will in the beginning and at the very end of the book of laws: the structure of the book becomes complete and balanced and the potentiality emerges of presenting anything in the book, when appropriate, as a valid statement of the laws of the saint king.[145]

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[143] *Msk*, ed Finnur Jónsson, pp. 187–89; *Fsk* 57, ed. Bjarni Einarsson, pp. 271–73. The court scald Þjóðólfr Arnórsson describes the situation vividly in his poem *Sexstefja*, sts. 20 and 10 (refrain), ed. Finnur Jónsson in Skjd I B: 343–44, 341: "Fire was set in retaliation (*at gjaldi*). The king decided so, and then the tall roof-Garm [fire] brought the luckless (*or* wicked) farmers to reason (*en þá téði / hár í hóf at færa / hrótgarmr búendr arma*) … There are few options but [to consent to] that which the king then wants to command the people."

[144] *Ágrip* 45, ed. Bjarni Einarsson, p. 42; *Msk*, ed. Finnur Jónsson, p. 297; *Fsk* 80, ed. Bjarni Einarsson, p. 302; *Hkr (Mber)* 1, ed. Bjarni Aðalbjarnarson 3: 210.

[145] Cf. F i. 16, ed. Storm in NgL 4 : 23: "En ver hugðum þo … at efter hins helga Olafs konongs lagasettning ok logmanna orskurðe skyli hver sitt mal til lycta lęiða."

More than anything else, this structural weight raises suspicions about the provenance and date of F 16.4. Although it is clearly impossible to maintain that no kings Haraldr and Magnús could ever have made a pronouncement touching upon the good old days of King Óláfr or sought to restore any legal practices that had purportedly prevailed at that time, the likelihood still remains that the clause as it stands now does not predate the *Codex Resenianus* version of *Frostuþingsbók*, *c*. 1260–1269.[146]

The Meaning of the Blended Text in Gulaþingsbók

In the reign of King Magnús Erlingsson, a revision of *Gulaþingsbók* was undertaken, and one of its effects presents some interest in the present connection. In the surviving manuscripts of *Gulaþingsbók* new passages do not replace the older version but stand side by side with it forming a peculiar structure. The medieval scribes mark off the two layers respectively as *Olafr*, *Ol*, or just *O* and as *Magn*[*us*] or simply *M*. The division is most clear-cut in the earliest manuscripts and gets increasingly confused in the later ones, apparently because the underlying idea was no longer clear.[147]

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[146] The tentative connection of F 16.4 with the revision of the law book in the 1260s that we have now suggested might shed light on the use of the term *réttarbót* on this occasion. However "irregular" it may seem against the background of the eleventh- and twelfth-century *réttarbœtr*, this provision could certainly be termed as such in the latter half of the thirteenth century. A set of King Hákon Hákonarson's *réttarbœtr*, which were given to the Þrœndir at the Eyrathing in 1260 and subsequently included in *Frostuþingsbók*, may serve as an example of this later usage, see F i. 22–24, ed. Storm in NgL 4: 24–25, introduced: "En þessar rętttar bætr gafom ver þrændum þa er þessor skipan var upplesen oc hanntekin a eyra þingi…" Here the king grants a victim of a thievery or another crime against property the right to compensate the losses from the outlawed offender's property. If we take for granted that otherwise the king could lay his hands on everything, as the texts seems to imply, this sounds like a *réttarbót* of the old days: the king waives his legitimate right for the benefit of the people. The next clause provides that the ship-district assemblies (*skipreiðuþing*) should function as courts of judicature so that a suitor should not have to go to a county assembly (*fylkisþing*). Although it is expressly stated there that the provision was made "for the convenience of the people" (*sęm buondum er hęgligra*), it is perhaps significant that a similar provision of an earlier date is not termed as a *réttarbót*, see F 8. 19 and 15. 16, ed. Keyser and Munch in NgL 1: 208, 257. Finally, the two following clauses, which deal with the redress due to an injured woman or royal steward (*ármaðr*), have nothing to do with the *réttarbœtr* of the earlier period that we attempted to outline above. Rather, they appear to be routine legal arrangements presented as "amendments of law". Cf. the preamble of King Eirik Magnússon's decree from 1280, ed. Keyser and Munch in NgL 3: 4: "ver kallum skylldu uara uera inuirðiliga eptir at sea oc vm at bœta log oc landzsens rett." This semantic development must have been prepared by a (presumably late) shift in the meaning of *réttr* to "objective legal order" (*das objektive Recht*) and apparently gave rise to an indiscriminate use of the term *réttarbœtr* for all sorts of royal legislation from the late 13th century on, see Johan Agerholt, *Gamal brevskipnad. Etterrøkjingar og utgreidingar i norsk diplomatikk*, Meddelelser fra Det norske riksarkiv, vol. 3 (Oslo: Feilberg & Landmark, 1929–1932), pp. 549–50; Blom, "Retterbot," cols. 112–13. On the use of *réttr* in the sense of the "objective legal order" in medieval Scandinavian sources see Klaus von See, *Altnordische Rechtswörter, Philologische Studien zur Rechtsauffassung und Rechtsgesinnung der Germanen*, Hermaea, n.s., vol. 16 (Tübingen: Niemeyer, 1964), pp. 29–30, 52–57. See also Karl Kroeschell's analysis of a parallel development in Frankish and German legal terminology in his "Recht und Rechtsbegriff des 12. Jahrhunderts," in *Probleme des 12. Jahrhunderts*, Vorträge und Forschungen, vol. 12 (Stuttgart: Thorbecke, 1968), pp. 314–18.

[147] Absalon Taranger, "De norske folkelovbøker," *Tidsskrift for Rettsvidenskap* 39 (1926) 188, 197–98.

Although the scribes do not specify to which Óláfr they refer, the audience could hardly have had any doubts that the person in question was King Óláfr Haraldsson. The belief that contemporary laws date back to their establishment by St Óláfr was occasionally expressed by Norwegian authors of the late twelfth century, and many others probably shared it in their time.[148] Apparently the scribes who needed to put a revised passage into the copy felt it natural to refer to the preexisting text as the "Óláfr" text.

The meaning of this division has been much discussed. Konrad Maurer believed that the blended text had originated as a result of compilation by a private individual of the original and the revised versions of *Gulaþingsbók*; this approach had been called forth by the confused political and legal situation in the country in the reign of King Sverrir and the following decades when the validity of the revised law book had become uncertain. The juxtaposition of the "Óláfr" text and the "Magnús" text was, in Maurer's opinion, a matter of practical expediency: the one or the other version was to be used according to circumstances.[149]

However logically consistent Maurer's interpretation may appear, his assumption that there existed a copy of the pure "Magnús" text is very implausible. As Ebbe Hertzberg has pointed out, not only there is no manuscript evidence for it, but also the passages representing the revision are interjected in the surrounding text with a degree of syntactical precision that strongly suggests that from the start both the "Óláfr" text and the "Magnús" text stood side by side in the revised *Gulaþingsbók*.[150]

In this light, the meaning of the blended text becomes all the more perplexing. Absalon Taranger sought to solve the problem arguing that all the changes and new articles introduced into *Gulaþingsbók* in the course of the revision were only provisional arrangements clearly distinguished from the laws proper (*lög*); they could subsequently become valid laws if acknowledged in practice.[151] Taranger based his argument was on an interpretation of the term *nýmæli*, "new law", which refers in *Gulaþingsbók* to a couple of new articles introduced in the book in the time of the revision, that is, the law of succession and a piece of penal legislation.[152] The word *nýmæli* in this sense is rare in Norwegian sources, and Taranger

[148] See below, pp. 52–53.
[149] Konrad Maurer, "Die Entstehungszeit der ælteren Gulaþingslög," pp. 137, 242–43. See also his *Udsigt over de nordgermanske Retskilders Historie* (Kristiania: Brøgger, 1878), pp. 18–21.
[150] Ebbe Hertzberg, *De nordiske Retskilder*, Nordisk Retsencyklopædi, vol. 1, pt. 2 (Copenhagen: Gyldendal, 1890), pp. 40–41. Cf. Finnur Jónsson, *Lit. hist.* 2: 989.
[151] Taranger, "De norske folkelovbøker," *Tidsskrift for Rettsvidenskap* 39 (1926) 198–202. This theory has been widely accepted ever since, most recently by Knut Helle in his *Gulatinget og Gulatingslova*, pp. 16–17. Only Edwin Torkelsen has voiced certain reservations, see Edwin Torkelsen and Grethe Authén Blom, "Fra gammel rett til ny lov: Noen problemer knyttet til nymælers «gyldighet»," HT 63 (1984) 260 n. 160.
[152] G 2 and 32, ed. Keyser and Munch in NgL 1: 3–4, 19–20.

relied heavily on Icelandic evidence, which is considerably richer in this respect. There the term occurs not infrequently in narrative and legal texts as well as letters that either were written in Iceland or refer to an Icelandic situation.

The legal force of the Icelandic *nýmæli* was subject to some remarkable restrictions. In *Konungsbók* of *Grágás* (GKS 1157 fol.), a clause is interjected between the Christian Laws Section and the Assembly Procedures Section:

> No *nýmæli* is to have effect for more than three summers and it is to be announced at Lögberg the first summer and at formally inaugurated spring assemblies or autumn meetings. All *nýmæli* become void if they are not included in the recital every third summer.[153]

A somewhat different regulation is known from the following note found in another Icelandic manuscript (AM 58 8vo, fol. 117 r): "On *nýmæli*. All *nýmæli* are to be put to Lögberg [*sic*] for three summers , thereafter regarded as law."[154]

A discrepancy between the two texts is conspicuous. It is only in the latter that the *nýmæli* are opposed to other laws (*lög*). It is not very clear, however, what this distinction, central to Taranger's theory, implies in this case. It is also provided here that a *nýmæli* should be regarded as a regular law after a three-year-long trial term.

The perspective of the other version differs significantly: no explicit distinction is drawn there between the *nýmæli* and other laws but it is stipulated that a *nýmæli* must be included in every lawspeaker's recital, otherwise it becomes void (*lauss*).

The discrepancy may also be rephrased in Taranger's terms: while the *nýmæli* eventually become the law in one of the versions, in the other they are the law from the start but may well cease to be it at any moment.

Other evidence also indicates that in late-twelfth-century Iceland a *nýmæli* could become null after three years. This was mentioned in an undated letter that Archbishop Eysteinn sent to the Icelanders, possibly in 1179. He expressed the hope that people would willingly accept a reform of the Icelandic Church although some called it a *nýmæli* and insisted that it ran contrary to the custom:

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[153] *Grágás: Islændernes Lovbog i Fristatens Tid*, ed. and transl. Vilhjálmur Finsen, 4 vols., Nordiske Oldskrifter, vols. 11, 17, 21–22, 32 (Copenhagen: Det nordiske Literatur-Samfund, 1852–70; hereafter the first two volumes, that is, the edition of the Old Icelandic text, are cited as Grg. 1 a and b) 1a: 37: "Lög oll scolo vera sogð vpp a þrimr sumrum. scal þa logsogv maþr af hendi bioþa lavgsogvna. Nymæli ecci scal vera lengr raþit eN .iij. sumur. oc scal at logbergi it fyrsta sumar vpp segia. a uarþingum helgoðvm eþa leiþum. Lavs erv øll nymæli ef eigi uerþa vpp sogð it .iij. huert sumar." I cite here and below the translation of Andrew Dennis, Peter Foote, and Richard Perkins in *Laws of Early Iceland: Grágás*, 2 vols., University of Manitoba Icelandic Studies, vols. 3 and 5 (Winnipeg: University of Manitoba Press, 1980–2000) 1: 51 and n. 103.

[154] *Gragas, Stykker, som findes i det Arnamagnæanske Haandskrift, nr. 351 fol. Skalholtsbok og en Række andre Haandskrifter*, ed. Vilhjálmur Finsen (Copenhagen: Gyldendal, 1883; hereafter Grg. 3), p. 443: " Wm ny laug. Nymæli aull skulu 3 sumur til laugbergis laugd wera sijdann fyre laug halldast."

> because we impart to you only what the pope has accepted from the canons of holy men, and we from him, and we wish that these [injunctions] will receive with you perpetual application and observance and not just for three years as I have heard someone bring up in words and in contemplation.[155]

Although there is, strictly speaking, no external evidence to determine which of the two versions of the clause more accurately reflects the functioning of a *nýmæli* in twelfth-century Iceland, it would be unfair to say that the two versions of the *nýmæli* regulation cited above are equally reliable as evidence. The latter version of the clause is not known from any of the surviving *Grágás* copies; it occurs as an isolated note in a manuscript written early in the seventeenth century, and it is far from clear on what source the anonymous scribe could rely.[156] To be sure, some scholars, like Ólafur Lárusson and Einar Arnórsson, accept this note as evidence on a level with the version of *Konungsbók*. One may, however, wonder if this is not merely an instance of wishful thinking when they dismiss all source-critical considerations and make use of it to substantiate their argument in a debate over the role of legislation in the legal order of early Iceland.[157]

In any event, it is difficult to understand why this piece of the seventeenth-century Icelandic antiquarianism should serve as the touchstone for understanding the nature of the blended text in Norwegian *Gulaþingsbók*. It is far from clear whether the revised articles of

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[155] Dipl Isl 1 no. 53: "[…] þviat þvi einv midlvm vier uit ydur. er papinn hefur til af heilagra manna settningvm tekid. en ver af honum. og villdvm vier at at þav tæke med ydur eilifa nyt. og gæslv. en eigi þrigia vetra einna. sem ek spyrr at svmer færi j ord og ætlon." The convoluted syntax of the letter led the editor to postulate a Latin original behind the extant text (Dipl Isl 1: 259), what would make a terminological analysis a tricky task, but in fact the fanciful style may well be due to the usages of the archbishop's chancellery, see Agerholt, *Gamal brevskipnad*, p. 793.

[156] On the manuscript, see Grg. 3: xlvii–viii and 443 *ad locum*. It contains excerpts from a large number of legal texts. The passage at issue stands in between King Christian II's confirmation (1507) of King Hákon V's *réttarbætr* and the text of one of them, concerning Iceland (from 1314, ed. Storm in NgL 4: 348 –53; Dipl Isl 2 no. 215).

[157] Ólafur Lárusson, *Yfirlit yfir íslenska rjettarsögu* (Reykjavik: [s.n.], 1932), p. 103; Einar Arnórsson, *Réttarsaga Alþingis* (Reykjavik: Alþingissögunefnd, 1945), pp. 61–62. The point at issue in the debate is whether a simple majority was enough or a unanimous vote was required to pass a *nýmæli* in the Law Council at the General Assembly (*alþing*). In the absence of direct evidence, the question remains largely a matter of speculation. Most Icelandic scholars, beginning with Vilhjálmur Finsen, maintain that the former procedure took place and that the passing of *nýmæli* was a routine business. It might seem difficult to harmonize this view with the cited clause of *Konungsbók*. In the words of Einar Arnórsson: "This regulation was not in all respects fortunate and rather vague. How long should a law that had once been a *nýmæli* have borne that name? A hundred-year-old law was a *nýmæli* once, but few people would have so called it when it had reached this age. It must have become so deeply rooted in the popular consciousness that it would have been unnatural if the Lawspeaker had made it void by the simple fact that he forgot it and other members of the Law Council did not remember it either, or did not care." Accordingly Einar Arnórsson suggests that the version of AM 58 8vo might have superseded at some time the other version of the clause. It is only natural that Konrad Maurer, who ascribed a far lesser importance to legislation in the Icelandic legal order, dismissed altogether the note in AM 58 8vo on source-critical grounds, see his "Die Rechtsrichtung des älteren isländischen Rechtes," in *Festgabe zum Doctorjubiläum des Herrn Geheimen Raths und Professors Dr. Joh. Jul. Wilh. v. Planck* (Munich: Kaiser, 1887), pp. 145–46. The question itself about the scale of legislative activity is of course considerably broader than this.

the book other than those two that are actually labelled as *nýmæli* in the manuscripts would have been so called by the contemporary Norwegian audience.

Taranger presumes that the Icelandic regulations concerning *nýmæli* were customary law in Norway at that time. As supporting evidence he cites the article G 32 introduced "Magnús gerði þetta nymęli …" and maintains that the "adoption of this *nýmæli* in the recital of laws and in *Gulaþingsbók* was carried on by stages in the course of a hundred years".[158] But in manuscript NRA 1 B a (*c*. 1200[159]), which is adduced as decisive evidence, the text of the article fills the page to the bottom, and there is no reason to doubt that it continued on the following leaf, now lost.[160] That the text written *en bloc* in a later manuscript is divided here into smaller sections, does not indicate the "adoption by stages" either.

The sources are deafeningly silent about this revision, and nothing is known with certainty about the procedure that was adopted on this occasion. It is significant, however, that the blended structure must have been original. It is also clear that this sort of text did not lend itself easily either to oral recital generally or specifically to an oral procedure of passing at the assembly.[161] The theory of an official law book as it has been forward by Taranger should perhaps be regarded with a certain degree of scepticism as far as *Gulaþingsbók* is concerned. Unlike *Frostuþingsbók*, it does not give any evidence that the book as a whole was ever formally accepted on any occasion.[162] It says, of course, that the laws governing the coast defence (*landvörn*) were written down in a presumably "official" manner. But it is striking that an express doubt is voiced here about the relative validity of this written statement and a divergent oral recital:

> We have now written down the laws governing the coast defence but we do not know whether the statement is right or wrong. But even though it be wrong, we shall keep the legal arrangements as to the levy that we had of old and which Atli recited before the men at Gula, unless the king wishes to give us other [plans], and we shall all agree to them.[163]

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[158] Taranger, "De norske folkelovbøker," *Tidsskrift for Rettsvidenskap* 39 (1926) 197–98.
[159] Didrik Arup Seip, *Palæografi: Norge og Island*, Nordisk Kultur, vol. 28: B (Stockholm: Bonnier, 1954), p. 6.
[160] NgL 4 pl. 13; *Den eldre Gulatingsloven*, ed. by Finn Hødnebø and Magnus Rindal, Corpus codicum Norvegicorum medii aevi, Quarto series, vol. 9 (Oslo: Selskapet til utgivelse av gamle norske håndskrifter, 1995), p. 221. There is room for one more line at the bottom of the leaf, but it was the end of a section and the scribe started each section on a new line so that it would have been left pending if he had chosen to fill the last line.
[161] Cf. Helle, *Gulatinget og Gulatingslova*, p. 18.
[162] F 12.1, ed. Keyser and Munch in NgL 1: 236, says "síðan … er bók siá var tecin," although it is not clear when and under what circumstances this event took place. It is also interesting that there is a number of instances in *Frostuþingsbók* when a reference is made to the book as a whole: F 1.2; 2.10; 9.19; 10.23, not to mention F i. 7, 9, 14, and 21 (King Hákon Hákonarson's ordinance, *c*. 1260). Nothing of the kind is to be found in *Gulaþingsbók*.
[163] G 314, ed. Keyser and Munch in NgL 1: 104: "Nu hafum vér landvorn vara a skra setta. oc vitum eigi hvárt þat er rett æða ragnt. En þo at ragnt se. þa scolom vér þat logmal hava um utgerðir várar er fyrr hever verit. oc

All in all, it is not clear what role an "official" law book could play at the thing before the monarchy took a keen interest in the administration of justice and put forward the demand that all cases should be adjudicated in accordance with the law book. The workings of the judicial system and settlement of conflicts in medieval Norway needs much further research before the issue about the part that the early collections of laws played at the things can be addressed on a more secure ground. From the start, however, it seems unjustified to think of these collections by analogy with modern law codes or reference books for those who sat in judgement to consult and distribute the prescribed fines accordingly.[164]

The question arises then whether the books of laws might have had other functions apart from their less than clear-cut role in assembly procedure – functions, or meanings, that a modern *Gesetzbuch* does not possess. Furthermore, we would suggest that these functions should be taken into consideration when interpreting the blended text of *Gulaþingsbók*. In fact, it is characteristic of many medieval collections of laws that they retain obsolete legal provisions and juxtapose them with new law. These features in a given collection do not necessarily imply that it was "private" or, in other words, that the public authorities took no interest in its production and / or dissemination. A well-known example is Frankish *Lex Salica*. It has been suggested that a great deal of its articles contained law that was already obsolete or obsolescent at the moment it was first committed to writing early in the sixth century; moreover, the collection was revised and widely disseminated in the reign of Charlemagne, apparently at official instigation, although even the revised version remained strikingly outdated and "impractical".[165] A pronounced interest in old law is apparent in many Scandinavian books of laws. Thus *Östgötalag* written late in the thirteenth century often contrasts old and new provisions on the same subject, as for example in *Bb* 2.1: "þa uar þæt sua först i laghum … nu ær þæt sua stat …" Sometimes the initiator of the new law is

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Atle talde firi monnum i Gula. nema konongr vár vili oss œðrom iatta. oc verðim vér satter aller saman"; transl. Larson, p. 200.

[164] Apart from the cleavage between the laws and the sagas that has been often emphasized, the books of laws give enough evidence to illustrate this point. Cf., *e.g.*, the introduction to the section about wergelds in F 6.1, ed. Keyser and Munch in NgL 1: 184: "Her hefr upp oc segir í frá því er flestum er myrkt oc þyrftu þó marger at vita. fyrer því at vandræði vara manna á millum. en þeir þverra er bæði höfðu til vit oc góðan vilia. hvesso scipta scylldi ákveðnum bótum ef þar ero dœmdar. fyrer því at þat er nú meiri siðr at ánemna bœtr hvesso margar mercr gulls uppi sculu vera epter þann er af var tecinn. oc velldr þat at marger vito eigi hvat laga bót er. en þo at vissi. þá vilia nú fáer því una. En frostoþings bóc scipter lagabót hveriom epter sínum burð oc metorði en ecki hinum bótum er þeir ofsa eða vansa er í dómum sitia oc sáttmál gera." Konrad Maurer, *Vorlesungen über altnordischen Rechtsgeschichte*, 5 vols. (Leipzig: Deichert, 1907–10) 3: 65, dates the section to the early decades of the thirteenth century.

[165] Hermann Nehlsen, "Zu Aktualität und Effektivität der älteren germanischen Rechtsaufzeichnungen," in *Recht und Schrift*, ed. by Peter Classen, Vorträge und Forschungen, vol. 23 (Sigmaringen: Thorbecke, 1977), pp. 449–502; Ruth Schmidt-Wiegand, "Lex Salica," in HRG 2 (1978) 1949–62.

mentioned. On one occasion the development of a particular regulation is traced trough several stages.[166]

It would perhaps be an anachronism to attribute this attention to outdated laws to an academic interest in legal history on the part of the compilers and scribes. Rather it suggests that history and law were not two things apart for the medieval audience and collections of laws were often an important vehicle for historical self-identification. Setting out "Óláfr" and "Magnús" side by side as the old and the new, the editors of *Gulaþingsbók*, so to speak, thematized continuity and change in law and society. There is no reason to think that they regarded the new laws as less valid because of their juxtaposition with abrogated sections in the book, even though they attributed these sections to Óláfr. They were not so much opposing themselves to the saint king as pursuing the development of a Christian society that he had initiated. Demarcating this way with the two royal names, they made the "laws of St Óláfr" more readily visible than perhaps ever before.

[166] *Östgötalagen (Bygda balkær)* 3.2, ed. H. S. Collin and C. J. Schlyter in *Samling af Sweriges gamla lagar*, 13 vols. (Stockholm: [imprint varies], 1827–77) 2: 192. Cf. Sten Gagnér, "i knutzs kunungxs daghum," *Tidskrift udgiven av Juridiska Föreningen i Finland* 97 (1961) 102–40; Olle Ekstedt, "Äro alla skiftesreglerna i Östgötalagen av samma ålder?" *[Svensk] Historisk Tidskrift* 82 (1962) 432; Carl Ivar Ståhle, "Östgötalagen," in KLNM 21 (1977), cols. 50–51; D. Strauch, "Östgötalag," in RGA 22 (2003) 3.

CHAPTER 3

The Age of Bloom, *c.* 1160–*c.* 1260

The Twelfth-Century Ecclesiastical Literature

There is a broad consensus among scholars that hagiographical tradition has exercised strong influence on the development of ideas about the "laws of St Óláfr". It is clear that some sort of ecclesiastical legend of the saint king must already have existed in the earliest phases of the history of the cult, but our knowledge of this tradition is very limited indeed. Whether the Church ascribed to St Óláfr any legislation already at that time is only a matter of conjecture.

It is only with the establishment of the archbishopric in Nidaros in 1152~53 and the subsequent bloom of hagiographical and historical writing in the latter half of the century that we are able to get the image of St Óláfr as conceived of by the Church in sharper focus. The ecclesiastical authors of that time attach much significance to the saint's legislative endeavour, although they put varying emphasis on individual aspects of it.

The life of St Óláfr, *Passio Olavi*, was written in the milieu around Archbishop Eysteinn or perhaps even by the archbishop himself. This text formed a base of the liturgical commemoration of the saint. Also, it could be utilized for purposes of edifying reading, but in this respect the vernacular version preserved in the so-called "Norwegian Homily Book must have been of greater importance.

Portraying St Óláfr as paragon of royal virtues, the life also gives prominence to the protagonist's legal activity.[167] The hagiographer sets forth the motives that led Óláfr to

[167] *Passio et Miracula Beati Olaui*, ed. F. Metcalfe (Oxford: Clarendon, 1881), pp. 70–71: "Nichil regii fastus, nichil tirannidis in suos exercebat subditos […] In futuro eciam prouinciis quibus preerat prouidens, ne nobiliores quique et potenciores per potenciam humiliores opprimerent, leges diuinas et humanas multa plenas sapientia et mira compositas discretione scripsit et promulgauit; in quibus suum cuique conditioni ius assignauit. In illis etiam, quantum liceret prelatis in subiectos, et quantam subiecti reuerenciam exhiberent erga prelatos, certis limitibus discreuit. Ibi modestissimus et equissimus arbiter, sapienter considerans plerumque reges potestate sibi consessa superbe abuti in subditos, legum rigore regalem cohercuit et refrenauit licenciam. In illis regibus [legibus] claret quam deuotus erga deum, quam benignus erga proximum rex gloriosus extiterit." In the following I cite, with alterations, the translation of Devra Kunin in *A History of Norway and The Passion and Miracles of the Blessed Óláfr*, Viking Society for Northern Research, Text series, vol. 13 (London: Viking Society for Northern Research, University College London, 1998), p. 29. The passage in question is lacking from another version of *Passio Olavi* found in a late-twelfth-century French manuscript published as an appendix to Eyolf Østrem's dissertation *The Office of Saint Olav: A Study in Chant Transmission*, Studia musicologica

compose and promulgate laws: as a good king he was concerned for the future of the people he ruled. His legislation was primarily aimed at organizing an ordered society. The author lays particular stress on the regulation of three important societal relations, which the saint king's laws provided:

(i) The "laws of St Óláfr" established a balance between different social layers: "lest the lordly and powerful should oppress the lowly with their might," the king "assigned to each estate its proper rights." The balance was founded on the principle of justice in its conventional medieval sense of *suum cuique*. This formula ultimately stems from the Roman jurist Ulpian who explained justice as a "constant and enduring will to give to everyone that to which he is entitled" and from Cicero for whom justice was a "habit of the mind which gives everyone their due, preserving [a proper regard to] the general welfare."[168] Possibly, the author of *Passio Olavi* was also influenced by a somewhat divergent tradition which understood justice as something that benefited most those who had least power and acted for the relief of the poor.[169]

(ii) The relationships between the Church and the secular society: the saint king "determined within strict bounds what authority the bishops should have over their people and what deference the people should show their bishops." It is interesting to note that the author does not bring up the question of the prerogatives of the spiritual and the temporal power. His statement that the king issued "laws pertaining to things sacred and things profane" (*leges diuinas et humanas*) might have sounded a little uncircumspect to a zealous Gregorianist, but for the author who is at pains to prove the apostolic status of his protagonist, Óláfr is clearly much more than an ordinary secular ruler.

(iii) The king and the people. The hagiographer insists that Óláfr was the complete opposite of a tyrant. Moreover, "wisely bearing in mind how often kings arrogantly misused power committed to them over their subjects, he restrained and bridled royal licence with the rigour of law." The author's language is not immediately transparent. It is plain that Óláfr professed himself bound by the laws.

Upsaliensia, n.s, vol. 18 (Uppsala: Acta Universitatis Upsaliensis, 2001). I am grateful to Prof. Lars Boje Mortensen who pointed out to me in his mail from 02.04.2003 that this version must be an abridgement of the fuller version.

[168] Ulpian, Dig. 1.1.10.pr.: "Iustitia est constans et perpetua voluntas ius suum cuique tribuendi"; Cic., *de inuent*. 2.53.160: "Iustitia est habitus animi communi utilitate conservata suam cuique tribuens dignitatem."

[169] See Stephan Kuttner, "A Forgotten Definition of Justice," *Studia Gratiana* 20 (1976) 75–109, reprinted with additional notes and corrections in his *The History of Ideas and Doctrines of Canon Law in the Middle Ages*, 2nd ed. (London: Variorum Reprints, 1992), with original pagination.

As such, the idea of a limitation of the monarchy by the laws is almost commonplace on the lips of an ecclesiastic. The important question is rather what sort of obligation on the part of the king the author of *Passio Olavi* is implying. Probably, his words meant different thing to different audiences. The "rigour of law" is construed by the author of the vernacular version of the saint's life in the so-called "Norwegian Homily Book" as legal sanctions (*sektir*) imposed by Óláfr on posterior kings and their officials "in case they violate truth."[170] It is hard to tell why the writer of *Passio Olavi* has chosen not to concretize in a similar way the nature of limitation that the saint king's laws laid on the royal power. Possibly, his understanding of juristic problems involved in the issue was more sophisticated and well-informed than that of the writer of the vernacular version.[171] More probably, the reason was that his principal concern lay in emphasising his protagonist's sense of equity and moderation. In *Passio Olavi* the relevance of St Óláfr's self-imposed limitation by the laws for the actuality of the author's day is mainly the one of a commendable example.

The picture of St Óláfr as legislator is an essential part of the image of a prudent and just king that *Passio Olavi* conveys to the reader. As we have indicated, the author builds up his account of the saint king's legislation to a great extent drawing on stock themes of medieval legal and political thought. In fact, for many medieval *litterati* legislative activity was something expected of a good king. The royal function *leges renovare*, *leges statuere*, etc., was already present in the writings of Carolingian ecclesiastics.[172] With the revival of interest in Roman law from the eleventh century on royal lawgivers and their panegyrists picked up

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[170] *Gamal norsk homiliebok, Cod. AM 619 4º*, ed. Gustav Indrebø (Oslo: Dybwad, 1931), p. 110: "Stillir hann oc konunga ok konungs menn. lastar of-dramb þæirra ok of mykin yfir-gang. ok lægr við sectir ef þæir ganga yfir hit sanna."

[171] In the opinion of the contemporary learned law jurists, the Prince was exempt from the coercive power of the laws since there existed no legal machinery for bringing him to justice if he broke them. He could not bind himself by his laws in the sense that he could not, in any meaningful sense, issue a command to himself. Nor could he bind his successors since, to quote a Roman law maxim, "an equal does not have authority over an equal." Nevertheless, they fully recognized the Prince's obligation to obey the law; the point was that the fidelity to the law, which was required of all men, had to be maintained in the case of the Prince alone through internal rather than external discipline. See particularly Ernst H. Kantorowicz, *The King's Two Bodies, A Study in Mediaeval Political Theology* (Princeton: Princeton University Press, 1957), pp. 94–96, 102–07, 135–36, 143–64; Brian Tierney, "'The Prince is Not Bound by the Laws.' Accursius and the Origins of the Modern State," *Comparative Studies in Society and History* 5 (1963) 378–400, and "Bracton on Government," *Speculum* 38 (1963) 301, 303–04, 309, both reprinted in his *Church Law and Constitutional Thought in the Middle Ages* (London: Variorum Reprints, 1979), with original pagination; Kenneth Pennington, *The Prince and the Law, 1200-1600: Sovereignty and Rights in the Western Legal Tradition* (Berkeley: University of California Press, 1993), pp. 77–90.

[172] See Hans Hubert Anton, *Fürstenspiegel und Herrscherethos in der Karolingerzeit*, Bonner historische Forschungen, vol. 32 (Bonn: Röhrscheid, 1968), pp. 78, 105; Janet L. Nelson, "Kingship, law and liturgy in the political thought of Hincmar of Rheims," *English Historical Review* 92 (1977) 242–43.

and developed the classical *topos* of sovereign power furnished with arms and adorned with laws.[173] The appeal of the image was apparently so irresistible that at least one royal biographer was able to display his hero as a law-reformer, unembarrassed by the fact that both he himself and his audience knew perfectly well that the king in question had shown no interest in these matters.[174] It is clear that the author of *Passio Olavi* had a fully respectable tradition to rely on when he chose to present his protagonist in a legislator's robe.

Yet the hagiographer's description of St Óláfr's legislation does not seem to be simply an exercise in eulogy or a nod to nostalgia for the irrevocable Norway ruled by the saint king. At the opening of his account the author indicates that these laws were to shape the future of the country. What is here just a half-veiled hint, is made absolutely explicit in another report of Óláfr's lawgiving written by Theodoricus Monachus at about the same time and in the same literary milieu.[175] According to his *Historia de antiquitate regum Norwagiensium*, these laws, "replete with justice and equity," were "committed to writing in the native language." To judge from this detail, the chronicler is thinking of a specific body of legislation. We are told, moreover, that the laws given by the saint king are "to this day upheld and venerated by all good men."[176] The assertion may sound quite cheerful but we know that Theodoricus was far from writing a panegyric on the Norway of his day. After the death of King Sigurðr Jórsalafari the author's countrymen have, in his judgement, immersed themselves in the "crimes, killings, perjuries, parricides, desecrations of holy places, the contempt for God, the plundering no less of the clergy than of the whole people, the abductions of women, and other abominations which it would take long to enumerate."[177] Seemingly, his words about the

[173] Medieval jurists found its definitive formulation at the opening of Justinian's *Constitutio* promulgating the *Institutes*, see Inst. prooem.: "It is expedient that the Imperial Majesty not only be distinguished by arms (*armis decoratam*), but also be protected by laws (*legibus armatam*), so that government may be justly administered in time of both war and peace, and the Roman Sovereign not only may emerge victorious from battle with the enemy, but also by legitimate measures may defeat the evil designs of wicked men and appear as strict in the administration of justice (*iuris religiosissimus*) as triumphant over conquered foes." I cite the translation of Samuel P. Scott in *The Civil Law*, 17 vols. (Cincinnati: The Central Trust Company, 1932) 2 : 3.

[174] See *Vita Ædwardi Regis* 1.1, ed. and trans. Frank Barlow, 2nd ed., Oxford Medieval Texts (Oxford: Clarendon, 1992), pp. 18–21, and the remarks of Frank Barlow, *Edward the Confessor* (London: Eyre & Spottiswoode, 1970), p. 178, and Wormald, *The making of English law* 1: 128–29.

[175] The relationship between Theodoricus and *Passio Olavi* remains a matter of dispute among scholars, but there seem to be good reasons to assume that the work of Theodoricus served as a source for *Passio Olavi*. See most recently Lars Boje Mortensen, "The Anchin manuscript of Passio Olaui (Douai 295), William of Jumiège, and Theodoricus Monachus: New evidence for intellectual relations between Norway and France in the 12th century," *Symbolae Osloenses* 75 (2000) 165–89.

[176] Theodoricus Monachus, *Historia de antiquitate regum Norwagiensium* 16, ed. Gustav Storm in *Monumenta historica Norvegiae, Latinske Kildeskrifter til Norges Historie i Middelalderen* (Kristiania: Brøgger, 1880; heafer MHN), p. 29; *An Account of the Ancient History*, p. 21.

[177] Theodoricus Monachus, *Historia de antiquitate* 34, ed. Storm in MHN, p. 67; *An Account of the Ancient History*, p. 53.

"good people" observing St Óláfr's laws do not imply that their number was large among his contemporaries.

The idea expressed by Theodoricus that the saint king's legislation was still valid law in Norway was repeatedly echoed over the following decades. The writer of the vernacular version of the life of St Óláfr in the "Norwegian Homily Book" inserts an affirmation to that effect into his rendition of the Latin original.[178] The "Legendary saga" claims that all Óláfr's successors have been obliged to the observance of these laws but the reader is kept in ignorance of whether or not they have actually abided by them.[179] The author of *Fagrskinna* is more positive on the matter: the saint king made laws and cast them in the form they have since been upheld (*á þá leið, sem síðan hafa haldizk*). His upbeat tone conforms very well to his general enthusiasm for the Norwegian royalty.[180] Remarkably, the Danish Saxo Grammaticus shares the opinion that the laws once instituted by St Óláfr are still in force in Norway of his day.[181] This unanimity of authors of different political stands and of different nationality is indeed remarkable.

Sverris saga

In order to understand the reasons for this trend, we must take into account not only the growing fame of Óláfr as saint but also the prominent part he came to play at that time in the self-representation of the Norwegian kingship, particularly in the reign of King Magnús Erlingsson and his rival and successor Sverrir. It will be enough for our purposes to briefly indicate the main features of this ideology christened "olavsideologi" in contemporary Norwegian scholarship.

In the much discussed privilege issued for the benefit of the archbishopric at some point in the 1160s or '70s, Magnús Erlingsson "assigned" himself and his realm forever to St Óláfr

[178] *Gamal norsk homiliebok*, ed. Indrebø, p. 110: "Afterwards he established laws among people which have since been upheld across the whole country."
[179] *Ólhelg (Leg)* 38, ed. Johnsen, p. 35: "King Óláfr had the custody of this people by divine will and right and according to the secular laws which he gave and every king has since been obliged to uphold."
[180] *Fsk* 31, ed. Bjarni Einarson, p. 181. It is only in *Fagrskinna* that we find undisguised eulogy of the Norwegian royal house, see the words about King Haraldr hárfagri in *Fsk* 2, ed. Bjarni Einarson, p. 58–59: "… hann skyldi vera yfirmaðr Norðmanna ríkis, er af hans ætt hefir tignazk þat land hér til ok svá mun vera jafnan." It has often been suggested that the saga was written for King Hákon Hákonarson, see especially Gustav Indrebø, *Fagrskinna*, pp. 275–78, and Kolbrún Haraldsdóttir, "Fagrskinna," in RGA 8 (1994) 149, with references to the literature.
[181] Saxo Grammaticus, *Gesta Danorum* 10.16.2, ed. J. Olrik and H. Ræder, 2 vols. (Copenhagen: Levin and Munksgaard, 1931–57) 1: 288: "Idem ignarum iuris populum passimque et agresti more viventem legibus salubriter editus ad melioris vitae habitum perduxit, quarum vetusta monumenta plebs Norica praesenti veneratione complecitur."

and promised to govern the kingdom "as this glorious martyr's hereditary possession under his dominion in the capacity of his vicar and of his vassal", or literally, "his tenant". Further the king professed himself to be the saint's *miles*, that is, "soldier" or perhaps "knight", and expressed his readiness to defend the country as St Óláfr's "possession". As a token of his eternal subjection, he gave the saint's church the right to receive posthumously his crown and those of his successors and, in confirmation, he placed his crown on the alter.[182]

This peculiar document has been convincingly interpreted, against the background of the contemporary political situation, as a part of the complex diplomatic manoeuvres that aimed to secure Magnús Erlingsson's positions against his adversaries within the country and repel the pressing Danish claims to overlordship. Under these circumstances it may have seemed much more advantageous for the Norwegian king to become St Óláfr's vassal than that of King Valdemar.[183] It has also been suggested that the king's position as St Óláfr's vicar and vassal entailed an obligation on his part to comply with the ideal of a *rex iustus*, which, in the contemporary interpretation, meant above all that the king should show obedience to the church and respect its liberty (and if Magnús failed to do so, the Church would render him answerable).[184] Altogether, in those years St Óláfr appeared as the "perpetual king of Norway"[185] as conspicuously as probably never before.

Paradoxically enough, the theme of St Óláfr's eternal kingship was continued by Magnús Erlingsson's most virulent political rival, Sverrir, who was at pains to present himself as the saint king's favourite. Nowhere is this contention more apparent than in a dream-story of his told in *Sverris saga*: Sverrir dreams that he comes to Norway where he becomes involved in a

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[182] *Priuilegium regis Magni*, ed. Eirik Vandvik and Vegard Skånland in Vandvik, *Magnus Erlingssons privilegiebrev og kongevigsle*, Skrifter utg. av Det Norske Videnskaps-Akademi i Oslo, II. Hist.-Filos. Kl., n.s., no. 1. (Oslo, 1962), pp. 12–16.

[183] This line of argument has developed particularly by Fredrik Paasche, *Kong Sverre*, 2nd ed. (Kristiania: Aschehoug, 1923), pp. 128–33, and Halvdan Koht, "Noreg eit len av St. Olav," HT 30 (1934–36) 81–109. Being a vassal was not considered at this time as disgraceful by itself (after all, the royal office was sometimes conceived of as a fief received from God, see Percy Ernst Schramm, *Der König von Frankreich: Das Wesen der Monarchie vom 9. bis zum 16. Jahrhundert*, 2nd ed. [Darmstadt: Wissenschaftliche Buchgesellschaft, 1960], p. 107), what really mattered was to have obligations to higher rather than a lower overlord, and the highest liberty and honour was to depend on God alone; cf. Karl J. Leyser, "The Polemics of the Papal Revolution," in *Trends in Medieval Political Thought*, ed. Beryl Smalley (Oxford: Blackwell, 1965), p. 53. An important implication of the allegiance was that, from a juristic point of view, no one could arguably be a vassal of two lords at the same time; this consideration encouraged many medieval rulers pressed by feudal claims of their more powerful neighbours to become liegemen of the Roman curia, as is pointed out by Walter Ullmann, *The Growth of Papal Government in the Middle Ages*, 3rd ed. (London: Methuen, 1970), pp. 335–36. A similar motive may well have led King Magnús to proclaim himself St Óláfr's vassal; the king promised to defend his realm "as St Óláfr's possession", what seems to have implied that every encroachment on the kingdom would have been considered as an injury inflicted on the saint himself.

[184] Torfinn Tobiassen, "Tronfølgelov og privilegiebrev, En studie i kongedømmets ideologi under Magnus Erlingsson," HT 43 (1964) 209–19, 220–21; Erik Gunnes, *Kongens ære: Kongemakt og kirke i 'En tale mot biskopene'* (Oslo: Gyldendal, 1971), pp. 145–46.

[185] *Historia Norwegiae*, ed. Gustav Storm in MHN, p. 109.

bitter conflict between King Óláfr the Saint and King Magnús Erlingsson. Predictably enough, he chooses to side with Óláfr's party. Not only is Sverrir welcomed there; the saint king himself shows marks of his special grace to his new retainer giving Sverrir a new name, *Magnús*, and handing over to him his own sword and standard with the words, "Take the standard, Lord, and ponder over that from now onwards you will always bear this standard!"[186]

There is no doubt that the developments of the last decades of the twelfth century, which we have outlined, decisively influenced the formation of the notion of the "laws of St Óláfr". On the whole, it was apparently a complex interplay of literary images and political actualities where impulses did not go just one way: the church formulated its ideals of the kingship through the medium of the hagiographic legend, and the saint king's role as legislator was given full prominence there; this picture could fail to make impact on the self-understanding of the secular power, but once the monarchy picked up the theme and put it to use in furthering its own interests, the men of letters were able to see the "laws of St Óláfr" materialize in their own day, and this could not but strengthen their trust in what they were reading in the writings of their predecessors. If initially there might have been something of a literary *topos* about the image of St Óláfr as legislator, this did not last long.

Unlike the men of letters, the kings seem to have had a very concrete and specific idea about what these laws amounted to. It is curious that their use of this concept was exclusively confined to two specific issues partly connected with each other. Both issues are brought out into full relief by the writer of *Sverris saga* in his accounts of the events of 1190:

> Presently much dissension arose between King Sverrir and Archbishop [Eiríkr], because of an agreement made by Archbishop Eysteinn with the yeomen, which King Magnús and Jarl Erlingr

[186] *Sverris saga* 5, ed. Gustav Indrebø in *Sverris saga etter Cod. AM 327 4°* (Kristiania: Dybwad, 1920), pp. 4–5. The imagery of the dream is heavily loaded with symbolic associations. The name *Magnús* was not only a dynastic name of high standing, it was also the name of St Óláfr's son, Magnús góði, and it obviously placed Sverrir in a very special relation to the saint king. Sverrir became Magnús not only in his dream: in the official usage the two names stood together, see Fredrik Paasche, "Sverre prest," *Edda* 3 (1915) 204, and *Kong Sverre*, pp. 232–33. The insignias, which St Óláfr confers on Sverrir in this dream, the sword and the standard, played a significant part in ceremonial representation of the monarch in contemporary Europe. The sword could stand both for the bestowal of the royal title and more generally, for the Ruler's power of coercion, see Percy Ernst Schramm, *Herrschaftszeichen und Staatssymbolik: Beiträge zu ihrer Geschichte vom dritten bis zum sechzehnten Jahrhundert*, 3 vols., Schriften der Monumenta Germaniae historica, vol. 13. (Stuttgart: Hiersemann, 1954-1956) 2: 651; Jean Flori, *L'idéologie du glaive: Préhistoire de la chevalerie* (Genève: Droz, 1983), pp. 83, 89, 90–93. The standard, which Sverrir received from the saint king, places the former on an equal footing with other sovereigns of medieval Europe who had a special liking for the role of a standard-bearer of celestial powers, see Schramm, *Der König von Frankreich*, p. 139, and *Herrschaftszeichen* 2: 652. Finally, it is significant that St Óláfr, handing over the standard to Sverrir, addresses him as "lord" (*herra*); it seems that this greeting was reserved for the king at that time, see Lars Hamre, "Herretitel," in KLNM 6 (1961) 509. Thus, through the language of readily understandable symbols, the saga dream conveyed the idea that the saint king himself had conferred royal powers on Sverrir.

> allowed to stand all the time they governed the realm. By this agreement, whenever the archbishop had to receive fines, the ounce of pure silver (*silfrmerktr eyrir*) should be the standard in these debts, whereas aforetime fines had been paid in the current ounce as in the king's suits.[187] Jarl Erlingr had brought himself to sanction this agreement, that the archbishop might be willing to anoint his son Magnús king. Thus the money standard became doubled. King Sverrir demanded of the archbishop that the old legal satisfaction (*lagaréttr inn forni*) should stand in the archbishop's as in the king's suits, and declared that Erlingr skakki ought not to have broken the laws of King Óláfr the Saint to have his son anointed king.[188]

King Sverrir presented his conflict with the Church as the defence of the traditional legal order hallowed by the name of the saint king. The extant sources indicate that the strife was considerably broader in scope than just the issue of the fines in ecclesiastical suits in the archbishop's diocese. In sum, it concerned validity of the reforms undertaken in connection with the establishment of the Norwegian church province in 1152~53 and over the following quarter of the century.[189] First, Sverrir vindicated lay control of the churches. Formerly the landowner who built a church on his estate claimed the right to appoint the priest and as a rule appropriated a part, and sometimes all, of the tithe and other church revenues for his use. This arrangement that modern historians commonly call the "proprietary church regime" (*Eigenkirchentum*) was banned by the new provincial statute, the so-called *Canones Nidrosienses*. The reforming clergy considered that the consecration of a church made it and all its possessions property of the saint patron to whom the altar was dedicated. The control of the churches should, in the opinion of the reformers, pertain only to the bishop. Second, Sverrir was unwilling to respect the canonical rules for choosing bishops. He claimed the right to present his candidate and have a voice at the election. Finally, he rejected the demands on the part of the Church to exercise exclusive jurisdiction over all offences against ecclesiastical law and to judge all criminous clerks no matter what the issue might be.

According to the saga, Archbishop Eiríkr sought to uphold his side of the argument citing the book called *Gullfjöðr*, "Golden Feather", that had been compiled at the instigation of Archbishop Eysteinn, as well as "Roman law" (*lög rúmversk*), that is obviously, principles of the church's *ius commune*, and letters from the pope. As for Sverrir, he tried all kinds of tactics to get his own way. The saga reports that he "always appealed to the law of the land, ordained by King Óláfr the Saint, and to the law-book of the Þrœndir, called *Grágás*, written

[187] Cf. F 3.2, ed. Keyser and Munch in NgL 1: 148.
[188] *Sverris saga* 112, ed. Gustav Indrebø in *Sverris saga etter Cod. AM 327 4º* (Kristiania: Dybwad, 1920), p. 119. The translation quoted is that of J. Sephton in *The Saga of King Sverri*, The Northern Library, vol. 4 (London: Nutt, 1899), p. 140.
[189] For this and what follows cf. Erik Gunnes, *Kongens ære*, pp. 149–229; Knut Helle, *Norge blir en stat*, pp. 85–90.

by command of King Magnús góði, the son of King Óláfr." Sverrir insisted that the "old law and custom" were on his side.[190] Other sources indicate, however, that he could equally well reverse his argument and claim that his position was fully justified by universally accepted norms of canon law.[191]

Yet of all the points on which Sverrir took issue with Archbishop Eiríkr, it was the double fines in ecclesiastical suits that the saga brought into special prominence. The reason was apparently that it was difficult to deny that when the archbishopric had been organized and the questions of the control of churches, episcopal elections, and jurisdiction of church courts had been regulated according to the new principles, the reigning kings Ingi, Eysteinn, and Sigurðr had consented to the reforms. Moreover, Sverrir himself had earlier expressly confirmed the privileges that the church had obtained on that occasion, although neither the saga nor "A Speech against the Bishops", a polemical treatise written by an anonymous supporter of Sverrir, mention this fact.[192] The doubled fines were clearly a special case. The validity of this provision only rested on the consent of Erlingr skakki who was regent during the minority of King Magnús Erlingsson, and Sverrir was in this case in a better position to throw their agreement into question. He argued that it was merely a bargain (*kaup*) which Erlingr had made with the archbishop in order to get his son crowned and which went counter to the "laws of St Óláfr" in two respects at once: for one thing, because the size of the fines was laid down differently in the old book of the laws that ostensibly recorded the legislation of the saint king, and for the other, because Magnús should not have become king in the first place:

[190] *Sverris saga* 117, ed. Indrebø, p. 122–23: "I þenna tima gerþuz margar greinir milli þeira Sverris konings oc erkibyscups. scaut konungr iafnan sinu mali til landzlaga þeira er sett hafði hinn helgi Olafr konungr. oc til lagabocar Þrænda. þeirar er colluð er Gragas er ritat hafði latit Magnus konungr hiN goði Olafs-son. Erkibyscup bað fram rekia þa boc er Gullfiauðr er colluð oc rita let Eysteinn erkibyscup. þar með bað hann log rumversc oc þat sumt er hann hafði til bref oc iNsigli pauans. Su var ein grein imilli þeira At þat varo forn log oc siðvenia at konungr oc bøndr scylldu lata gera kirkiur a bøiom sinum oc með sinum kostnaði ef þeir villdi. scylldu þeir raþa fyrir þeim kirkium oc raða presta til. […] En erkibiscup neitaði"; *The Saga of King Sverri*, p. 144.

[191] That was the argument of the so-called "Speech against the Bishops", see Gunnes, *Kongens ære*, pp. 63–67, 174–76, 203–17, 257–68, 299–307, 337–42, 352–57.

[192] See King Hákon Sverrisson's letter to Archbishop Eiríkr and the other bishops from *c*. 1202, ed. R. Keyser and P. A. Munch in NgL 1: 445: "… and I promise to the holy church and the clergy that all the liberties which it should possess in agreement with what the holy canons (*heilagar rittningar*) provide by way of clarity between myself and them and which the holy church has had from ancient and modern times, without prejudice to my kingship and all royal dignity, as Cardinal Nicholas established and the three kings, Eysteinn, and Sigurðr, and Ingi, promised and swore, and as the charter of King Eysteinn attests, and as King Magnús confirmed, and also my father by his charter, and so as the oaths testify that were sworn in Cardinal Fidentius' [Stephanus'?] presence."

> For Magnús was not rightly chosen, inasmuch as never before since Norway became Christian had one been king who was not a king's son; nor yet in heathen times; it was also forbidden in the land's law ordained by King Óláfr the Saint.[193]

Later saga authors give a detailed report of the background of Magnús Erlingsson's coronation. They visualize it as a conversation between the archbishop and the jarl. Erlingr was taking objection to the new tariff imposed by Eysteinn and appealing to the laws of St Óláfr. The archbishop was making the point that the real law-breaker was the jarl himself because he had his son chosen king: "He is king who is not a king's son." Erlingr's counterargument, as presented by the writer of *Fagrskinna*, was subtle enough:

> "My lord, since it is not written in all books of laws that he who is not a king's son is not to be king and since it was in accordance with your will and with that of the other bishops that Magnús was chosen king of the whole country, you can strengthen him and his power so that it will be God's law that he is king."[194]

In *Heimskringla*, the conversation between the jarl and the archbishop developed along essentially the same line, but there Erlingr's reasoning was founded on historical precedents:

> "William the Bastard was not a king's son, yet he was consecrated and crowned king of England, and the royal power has remained in his line in England, and all have been crowned. Sveinn Úlfsson of Denmark was not a king's son, yet he was crowned king, and his sons after him, and each of his successors in that line was a crowned king. […] Let us have a crowned king as have Englishmen and Danes."[195]

As we see, the saga authors are unanimous in that Magnús Erlingsson' descent through the female branch of the royal family gave him no right to the throne, and the anointment was intended to substitute the lacking blood-right. Modern historians for the most part share their opinion.[196] It is important to realize, however, that this assumption has no other foundation than the allegations of Sverrir himself, reproduced in *Sverris saga*, which in turn firmly set the cadre for the writers of *Fagrskinna* and *Heimskringla*. But was it the opinion of Magnús Erlingsson's contemporaries? The question is quite meaningless in this form: different people may well have looked on the matter differently. There is evidence indicating that the king's pedigree was not invariably construed as a detriment to his title. The anonymous author of the

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[193] *Sverris saga* 112, ed. Indrebø, p. 119; *The Saga of King Sverri*, p. 140. Cf. Sverrir's words addressed to Magnús during their meeting in Bergen in 1181, *Sverris saga* 60, ed. Indrebø, p. 68: "þat varþ eN alldri fyR i Noregi at sa væri konungr callaðr er eigi var konungs son." Two years earlier, standing at Erlingr's grave, Sverrir reportedly said that one should pray to God for the jarl's soul because the latter being only a baron (*lendr maðr*) had had the audacity to get his son chosen king, see *Sverris saga* 38, ed. Indrebø, p. 43.

[194] *Fsk* 108, ed. Bjarni Einarsson, p. 350.

[195] *Hkr (MErl)* 21, ed. Bjarni Aðalbjarnarson, p. 397; transl. Hollander, pp. 806–07.

[196] See most recently Knut Helle, *Under kirke og kongemakt 1130–1350*, Aschehougs Norgeshistorie, vol. 3 (Oslo: Aschehoug, 1995), p. 34; Claus Krag, *Norges historie fram til 1319* (Oslo: Universitetsforlag, 2000), p. 111.

poem *Nóregs konunga tal* composed in Iceland around 1190 lays particular stress on Magnús' descent calling him "Kristín's son" and apparently thinks of it as something honourable.[197] In fact, *Sverris saga* itself says about Magnús that "his ancestry was the greatest advantage to him; for all the people of the land loved him because of it, preferring rather to serve a descendant of Sigurðr Jórsalafari than one of Haraldr Gilli."[198] For reasons of his own, the saga author might have somewhat exaggerated the extent of popular support enjoyed by Magnús Erlingsson's regime,[199] but there is no reason to doubt that his account accurately reflects the sentiments shared by quite a few people at that time.

Now if we take a look at the history of royal succession in Norway, we will at once notice that power typically passed from father to son. However, this fact does not demonstrate, of itself, that there existed a conscious, verbalized norm excluding claimants through the female branch of the royal family from succession to the throne. In fact, there was a series of departures from the general trend that stretched back to the eleventh century, when Haraldr harðráði laid claim to the throne as Óláfr Haraldsson's maternal half-brother, and included the anti-king Óláfr ógæfa in the 1160s, who was the son of Maria, Eysteinn Magnússon's legitimate daughter, as well as the king of the Birkibeinar Ingi Bárðarson (1204–17), the son of Cecilía, King Sigurðr munnr's daughter, and the king of the Baglar Philippús Símonarson (1207–17), the son of Margrét, King Ingi's maternal half-sister. These exceptions were possible and in a way normal as long as there was no hereditary monarchy in the strict sense and the royal title was conferred through an act of election at the popular assembly.[200]

Sverrir was at pains to present the practice of royal succession from father to son as a binding legal rule. Moreover, as we have seen, he brought it into association with St Óláfr's name. It is far from certain whether in doing that he was able to rely on any pre-existent tradition. At any rate, neither the twelfth-century ecclesiastical sources nor the thirteenth-century saga accounts of Óláfr's reign imply that the saint king concerned himself with regulating the matters of succession to the Norwegian throne. We find, to be sure, an

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[197] *Nóregs konunga tal* 57, 68, and 70, in Skjd. 1B: 585, 587. On the dating of the poem see Finnur Jónsson, *Lit. hist.* 2: 110–13.

[198] *Sverris saga* 3, ed. Indrebø, p. 3; *The Saga of King Sverre*, p. 4. Cf. Magnús Erlingsson's epitaph in *Sverris saga* 98, ed. Indrebø, p. 104: "oc hyGiom ver þes mest hafa at notit at ollu landz-folkino var sva kært alt af-kvæmi Sigurðar konungs Iorsala-fara oc Eysteins konungs broþur hans."

[199] Cf. Helle, *Under kirke og kongemakt*, p. 61; Sverre Bagge, *From Gang Leader to the Lord's Anoninted: Kingship in* Sverris saga *and* Hákonar saga Hákonarsonar, The Viking Collection, vol. 8 (Odense: Odense University Press, 1996), p. 47–48, 82.

[200] Cf. Bull, *Det norske folks liv og historie*, pp. 191–92. See also Absalon Taranger, "Om kongevalg i Norge i sagatiden," HT 30 (1934–36) 112, who comes to the conclusion that "som tronpretendenter til landskongedømmet er kongesønner (ekte og uekte) i Harald Hårfagres ætt fortrinsberettiget, men ikke eneberettiget. Folket kan også velge andre."

unambiguous statement of the principle of agnatic succession in Snorri, but there it is ascribed to King Háraldr hárfagri.[201] It is impossible to establish who of the two – Sverrir or Snorri – was more in agreement with the tradition. In choosing the originator of the assumed basic tenet of Norwegian succession law, Haraldr and Óláfr were, in fact, equally likely options. On the one hand, the Norwegian kings traced back their ancestry to Haraldr, they were his "stock" (*ætt*); on the other, Óláfr was also of capital importance in the self-understanding of the royal house: he brought with himself the Christian charisma, creating a new good fortune for the kindred and demonstrating God's special blessing on the house; in other words, he was the family's new beginning.[202] Once it was assumed that the rule of agnatic succession had sometime been established as such, choosing between these two options became simply a matter of personal beliefs when not of practical expediency: in the predominantly oral culture of that time remembered truth was flexible enough and prone to smooth "updating".[203]

As the saga presents it, Sverrir's contention that the succession to the Norwegian throne was by the "laws of St Óláfr" restricted to the members of the royal family descended in the mail line, only aimed to prove that Magnús Erlingsson's had obtained his title in an illegitimate way. However, his argument also had far-reaching implications for the understanding of the role the hereditary principle played in king-making generally, and they were subsequently developed to a logical end in Sturla Þórðarson's *Hákonar saga Hákonarsonar*.

Hákonar saga Hákonarsonar

The leading theme of the opening part of the saga is the protagonist's predestination to become king. His fate is likened to that of Óláfr Tryggvason: As Óláfr and his mother Ástríðr had to flee the country in order to escape the power of Gunnhildr and her sons, so Hákon's mother Inga with her little baby have to take flight from Viken swarming with the Baglar north to Nidaros, the stronghold of the Birkebeinar. On the way they experience hardships

[201] *Ólhelg (Sep)* 1, ed. Johnsen and Jón Helgason, p. 8; *Hkr (Hhárf)* 33, ed. Bjarni Aðalbjarnarson 1: 136–37; transl. Hollander, p. 87: "When King Haraldr was fifty [sixty. – *Ólhelg (Sep)*] years old … [he] called a great assembly in the eastern part of the country to which he especially summoned the people in the Uppland disctricts. There he bestowed the title of 'king' on all his sons and put this into the laws that each of his descendants was to inherit a kingdom after his father, and an earldom, each who was of his kin on the female side (*sá, er kvensift var af hans ætt kominn*)."

[202] On Óláfr's role as the dynasty's *Spitzenahn* see particularly Erich Hoffmann, *Die heiligen Könige bei den Angelsachsen und den skandinavischen Völkern: Königsheiliger und Königshaus*, Quellen und Forschungen zur Geschichte Schleswig-Holsteins, vol. 69 (Neumünster: Wachholtz, 1975), pp. 83–89, cf. pp. 10–11.

[203] Cf. M. T. Clanchy, "Remembering the Past and the Good Old Law," *History* 60 (1970) 165–76.

similar to those Óláfr and Ástríðr fell into on their journey. Finally, safe and sound, Hákon reaches the court of King Ingi and Jarl Hákon galinn who gladly accept him. The following account centres on the issue of Hákon's rights to the throne as the lawful heir of his father, King Hákon Sverrisson. Anticipating later events, the saga author gives the reader to understand that from the very outset the matter has been clear as day to any unbiased person. Even the jarl himself, who takes the boy into his house and treats him as though he were his own son, often says that King Ingi and himself have the boy's inheritance in their keeping.[204] That is to say, succession to the throne is subject to the same rules as transference of all other property: a heritage can by rights belong only to the heir even if he is a minor and cannot for the moment win satisfaction of his claim. The saga author is making a point that would be immediately taken by anyone familiar with the contemporary laws governing inheritance:

> If inheritance comes into the hands of a minor. If a man who seems to be the heir receives an inheritance and men present the claims of a minor and he [the minor] asserts that the one who has the inheritance in his possession (*er í arf sitr*) is not the right heir, his claim shall rest till he is fifteen winters old, when he shall himself prosecute his suit.[205]
>
> If a man has an unappraised inheritance in his keeping (*sitr i arve uvirðum*), one that was not assessed at the seventh-day ale, the minor [heir] shall go before the thing as soon as he comes of age; and let him present a sworn claim to as much property as he intends to demand under oath.[206]

Developing his line of argument, Sturla gives a detailed report of the discussion of succession to the throne occasioned by King Ingi's illness. This story plays no part in the development of the plot because Ingi recuperates, but Eyvindr prestsmágr, a rather obscure figure among the leaders of the Birkibeinar, gets an opportunity to state Hákon's claim and to counter Skúli Bárðarson and other pretenders. In his speech which is characterized in the saga as an *órskurðr*, an authoritative decision on a point of law, Eyvindr makes it clear that there is no question of any of Ingi's relatives inheriting the throne from him because it rightfully belongs not to Ingi but to young Hákon who is the heir of his father, King Hákon Sverrisson:

> "This matter … lies so light before the eyes of all men who know what is right and will speak truth … And if those both brothers were alive, jarl Hákon and King Ingi, on the day when

[204] *Hákonar saga Hákonarsonar* 4, ed. Albert Kjær and Ludvig Holm-Olsen in *Det Arnamagnæanske Haandskrift 81a Fol. (Skálholtsbók yngsta)* (Kristiania / Oslo: Norsk historisk kjeldeskrift-institutt, 1910–86), p. 229: "Jarll … lysti þui opttliga fyrir sinum mønnum, at þeir Jnge kongr badir satu j faudrarfi þessa sueins"; cf. *Hákonar saga* 5, ed. Kjær and Holm-Olsen, p. 302: "vier sitium j ættleifd hans ok faudrarfi."
[205] F 9.27, ed. Keyser and Munch in NgL 1: 215; transl. Larson, p. 340.
[206] G 119, ed. Keyser and Munch in NgL 1: 52; transl. Larson, p. 115.

> Hákon, the son of King Hákon were of full age, then he might go and claim from them his inheritance and turn them out of the throne and seat himself on it in their stead."[207]

Thus the similitude between succession to the throne and inheritance of property is brought to a logical extreme. Of the election as an instrument that confers royal powers, there is not a single word.

Justifying Hákon's claim to the throne, the saga writer lays particular emphasis on the distinction inherent in the male and the female lines of descent. Even Hákon's enemies, the Baglar, are conscious of the capital importance of this distinction, and when Hákon falls for a while into their hands, one of them suggests taking him as their king since "we know the laws of King Óláfr the Saint: he is rightful king who is a king's son, and not a daughter's son or a sister's son of kings as we now serve on both sides, Birkibeinar and Baglar."[208] Since Hákon's right to the throne firmly rests on the "laws of St Óláfr", the saint king becomes the protagonist's special patron. We are told that Jarl Hákon and King Ingi made an agreement (*einkamál*) concerning succession to the throne, to the exclusion of Hákon Hákonarson, and their agreement was published at the Eyraþing assembly and sealed by the bishops. However, Hákon himself, then an eight-year-old boy, remains unruffled by the news remarking that "it is hard to see if this decision will hold out or not, because there was no my attorney (*umbóðsmaðr*) there to answer on my behalf." When asked who his attorney is, the boy replies, "God and King Óláfr the Saint; into their hands have I put my claim, and they will see to it that I receive my share of the land and of luck."[209]

In 1217 King Ingi dies, and the question of succession arises. Despite the intrigues of his adversaries, Hákon Hákonarson becomes king. A few years pass, and finally, at the expense of much effort, the country is pacified. "But still there was a great claim on the king's realm and heritage on behalf of those men who wished to push themselves up to the kingdom."[210] In order to settle the issue definitively, a national assembly gathers in Bergen in 1223. Four pretenders lay claims to the royal title and their share of the land: Jarl Skúli who was King Ingi's half-brother, Gutthormr, Ingi's illegitimate son, Sigurðr ribbungr, the son of Erlingr who in turn passed himself for King Magnús Erlingsson's son, and there were also messengers from Knútr, the legitimate son of Jarl Hákon galinn. In the opinion of modern

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[207] *Hákonar saga* 9, ed. Kjær and Holm-Olsen, p. 306; transl. G. W. Dasent in *The Saga of Hacon and a Fragment of The Saga of Magnus*, vol. 4 of *Icelandic Sagas and Other Historical Documents Relating to the Settlements and Descents of the Northmen on the British Isles*, 4 vols., Rolls Series, vol. 88 (London: Eyre & Spottiswoode, 1887 –94), p. 15.
[208] *Hákonar saga* 4, ed. Kjær and Holm-Olsen, p. 300.
[209] *Hákonar saga* 6, ed. Kjær and Holm-Olsen, p. 303–04.
[210] *Hákonar saga* 85, ed. Kjær and Holm-Olsen, p. 375; transl. Dasent, p. 77.

historians, Hákon Hákonarson's rights were not altogether beyond doubt from a legal point of view;[211] in the account of the saga, however, the case is presented in a totally different light. All threads of the plot are skilfully drawn together in the account of this event; all arguments supporting the rightfulness of Hákon's cause, scattered as they were over the preceding narrative, are now marshalled in order to produce a cumulative effect. The king is calm and confident that he is in the right: all his forefathers have ruled the country, "man after man, so that no female link has ever intervened," so he is the true heir (*óðalsmaðr*) to Norway. Although Skúli insists that he is the lawful heir of his brother, King Ingi, and as such entitled to the throne according to the "laws of St Óláfr", that is just a lamentable and to him ultimately fatal misapprehension, suggested to him by his wicked counsellors. The case is brought to the judgement of lawmen that gathered from different parts of Norway. Gunnarr bóndi, the oldest among them and the "wisest man in the country", takes the floor and points to the incontestable authority that "knows what is true and tells the truth, whether it concerns rich or poor, but dreads no man that it may mislike someone," that is, the "law-book of King Óláfr the Saint, which after his ordinance was made for all Norway, and which all Norwegian kings have since kept who wish to follow right."[212] And according to this law-book, only Hákon has the right to the throne. All other claims are nothing but false pretence: even if King Ingi were still alive, he would be required by law to renounce his title for the benefit of Hákon Hákonarson. Then other lawmen have their say, each concluding that Hákon is the only rightful king. The truth triumphs, and Hákon's rivals are once and for all disgraced.

To divide fact from fiction in this story written forty years after the events it describes is now virtually impossible. Much had changed in the country in the interim. The kingship had changed, too. In 1260 a new law had been published at the Frostuþing assembly by which succession to the throne had become automatic and the elective principle had been reduced to an act of acclamation at the Eyraþing assembly. Some peculiar turns of phrase in this law remind one of the episodes of *Hákonar saga*: it speaks of the heir to the throne as *óðalborinn*, "by birth entitled to his patrimony"; it grounds the hereditary right in the "laws of St Óláfr" and likens it to the "rights that every yeoman wishes to be allowed by others in regard to his inheritance".[213] We may suspect that the benefit of the hindsight that Sturla Þórðarson was able to enjoy, in many respects affected his account of the past events, but we can only

[211] Halvdan Koht, "Skule jarl," HT 5th ser., vol. 5 (1924) 430–34, points out that "det er fast regel i gamal tid at arven blir rekna ifrå siste kongen som har levd," that is, from Ingi in this case, and not from Hákon Sverrisson; Koht also suggests that Skúli's claim was in a good agreement with the ecclesiastical views on rights of succession. See also Bull, *Det norske folks liv og historie*, pp. 260–61; Bagge, *From Gang Leader*, pp. 98, 100.
[212] *Hákonar saga* 91, ed. Kjær and Holm-Olsen, p. 382; transl. Dasent, p. 82.
[213] NG 4–8, ed. Keyser and Munch in NgL 2: 308–10. Cf. Helle, *Norge blir en stat*, pp. 116–17.

speculate "how it was" in actuality.[214] For our purposes it is more important that the evidence of *Hákonar saga*, however unreliable it may be as a foundation for reconstruction of the political collisions of the first quarter of the century, gives a very clear indication that the Norwegian kingship at some moment during Hákon's reign, which does not lend itself to a more precise dating, put the notion of the "laws of St Óláfr" to use in order to justify foundational changes in the political system and turn Norway into a veritable hereditary monarchy.

New and Old Law in King Hákon Hákonarson's Ordinance against Homicide

The extant version of the laws of the Frostathing Assembly, preserved in the seventeenth-century copies of the lost medieval *Codex Resenianus*, opens with an ordinance issued by Hákon Hákonarson in *c*. 1260 that provides a sort of introduction to this book of laws. In many respects King Hákon's ordinance marks a milestone in Norwegian legal history. To begin with, the king is acting, for the first time, as a sovereign legislator giving law on his own authority.[215] The form of a solemn royal diploma given as it is to the ordinance highlights this fact:

> King Hákon, son of King Hákon and grandson of King Sverrir, sends the greetings of God and his own [greetings] to clerks and barons, freemen and farmers, those now living and those to come, and to all God's friends and his own who now dwell in Norway.[216]

Like in some earlier Norwegian legal enactments, counsel of secular and ecclesiastical magnates is said to have preceded the promulgation of the law but there is a significant difference between how this counsel functions in the older legislation and in King Hákon's ordinance. If previously a law was occasionally said to have been accepted on the advice of the king and the magnates, now the monarch gives the law after a consultation with a chosen group of his subjects.

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[214] In this respect a privilege issued *c*. 1222 by Hákon Hákonarson for the benefit of the archbishop (Dipl Norv 3 no. 1) is of particular interest. It says, "… we [King Hákon] have promised on our behalf and on the behalf of those who will legitimately (*loglega*) be chosen to [the government of] the country after us … to Archbishop Gutthormr and to all those who will canonically (*gudlega*) be chosen to the office of archbishop after him …" In other words, the king's office is elective in the way that of archbishop is. Hereditary right to the throne does not even gets a mention. Cf. Sverre Steen, "Tronfølgeloven av 1163 og konungstekja i hundreåret etter," HT 35 (1949–51) 43.

[215] Cf. Knut Helle, *Norge blir en stat*, p. 226.

[216] F i. 1, ed. Gustav Storm in NgL 4: 19: "Hakon konongr son Haconar konongs sunarson Suærris konongs senðer lenndom ok lærðom buonðom ok buðegnom veranðom ok viðr komanðom ollom guðs vinom ok sinom þeim sem Noreg byggia guðs ok sina"; transl. Larson, p. 213.

The concern that led King Hákon to issue the new law is expressed in clear terms in the preamble: it necessary to reduce homicide (*at minka mandrapin*) in the country. We are told that endless blood feuds are wreaking havoc on the kingdom. Worst of all, private vengeance often strikes innocent people, indeed the best men of a given family. This practice has ossified into a custom (*i uenio*) but it is a bad custom and as such it must be abolished.[217] Therefore the ordinance imposes a penalty of outlawry for everyone who avenges themselves not on the offender but on his relatives, and yet even those who take revenge directly on the offender must incur the same heavy punishment in case the king has chosen to pardon him.

The radical changes introduced in penal law by King Hákon's ordinance marked a turning point in the development of administration of justice in medieval Norway.[218] Outlining the trend with a measure of simplification, we may say that originally most criminal offences were considered as violations of private rights and led to extra-judicial vengeance and compensation. The dominance of self-help was mainly the result of a general weakness of public authority. A dramatic growth of royal power in Norway in the High Middle Ages made it possible for the king and his officials to effectively take over the function of settlement of conflicts and maintenance of order.[219] Gradually a legal framework was provided for the king's interference in these matters. A number of laws concerning the preservation of peace and giving the king the power to prosecute certain crimes were enacted during the latter half of the twelfth century,[220] and this tendency was further institutionalised with King Hákon's ordinance of 1260.

However, the rise of efficient administrative machinery could not have been the sole reason for the developments in law. Another powerful factor was indubitably the influence of the church who regarded a crime as an encroachment on the divinely instituted order and thus

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[217] The distinction between good (rational) and bad (irrational) customs stems evidently from the learned law, see Brie, *Die Lehre vom Gewohnheitsrecht*, pp. 24–32, 69–71, 75–78, 114, 117–18; René Wehrlé, *De la coutume dans le droit canonique: Essai historique* (Paris: Sirey, 1928), pp. 111–19. In medieval Norway influence of this concept is noticeable from the latter half of the twelfth-century on, see the description of St Óláfr's enemies in *Passio Olavi* where an opposition between *consuetudo* and *ratio* is brought into high relief, ed. F. Metcalfe, p. 69. This set of ideas played a significant role in the history of medieval legislation. Presenting the interference of the government with various aspects of legal and social life as abolishment of a bad custom had a long tradition by the time of Hákon Hákonarson. The Norwegian document is directly comparable in this respect to ordinances of thirteenth-century French kings who repeatedly resorted to the notion of a "bad custom" in their attempt to restrain private wars of the feudal aristocracy, see François Olivier-Martin, "Le roi de France et les mauvaises coutumes au moyen âge," ZRG GA 58 (1938) 117, 122–23, 136.

[218] Poul Gædeken, *Retsbrudet og Reaktionen derimod i gammeldansk og germansk Ret* (København: Gad, 1934), pp. 189–95.

[219] Helle, *Norge blir en stat*, pp. 186–89.

[220] See G 32, F 2.10 and 5.44–46, and the statute issued in 1189~90 by an ecclesiastical synod where King Sverrir probably participated, ed. R. Keyser and P. A. Munch in NgL 1: 19–20, 134, 182–83, 409. Cf. Absalon Taranger, *Udsigt over den norske rets historie*, 2 vols., Kristiania: Cammermeyer, 1898–04) 2: 194–95; Gædeken, *Retsbrudet*, pp. 204–8.

an offence against God. According to her teaching, the punishment of criminals was one of the king's foremost duties.[221] In Norway, the ecclesiastical doctrine had exercised noticeable influence on the representation of the monarchy long before the king's role in prosecution of crimes assumed legally established forms. Eleventh-century court scalds commonly referred to their patrons by circumlocutions such as the "enemy of plunderers (thieves, etc.)".[222] In the twelfth century the motif of the king curbing wrongdoers and penalizing "those whose own wickedness and persistence in evil had already condemned them" featured prominently in the ecclesiastical literature about St Óláfr.[223]

By that token, it is not surprising that an ordinance declaring a "war on crime" should have had recourse to the image of the saint king. However, the specific form it has assumed in King Hákon's ordinance of 1260 may raise certain bewilderment at first glance. Although as we have seen, the king is acting in the role of a sovereign lawgiver, he does not publish the norms set out in his ordinance as his own establishment. What is clearly a dramatic legal change from the prospective of the modern historian, the idiom of the document presents as a restoration of the laws once given by the king's sainted predecessor but formerly neglected: "We thought it most befitting, to begin with, that the laws of King Óláfr the Saint are to stand as he had established them, although this has not been observed heretofore owing to avarice."[224]

Yet from the point of view of contemporary European legal thought, the statement was entirely consistent with King Hákon's legislative ambitions. The *topos* of "renovating" or "restoring" law as it had been in old days (rather than "replacing" one law by another) was

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[221] The theme is pervasive in ecclesiastical literature. The words of the English author Wulfstan (d. 1023) may serve a good illustration, see *The Institutes of Polity* 2.6–8, ed. Karl Jost in *Die 'Institutes of Polity, Civil and Ecclesiastical', Ein Werk Erzbischof Wulfstans von York*, Schweizer anglistische Arbeiten, vol. 47 (Bern: Francke, 1959), pp. 44–46; transl. Michael Swanton in *Anglo-Saxon Prose* (London: Dent; Totowa, N.J.: Rowan and Littlefield, 1975), p. 126: "…And it behoves him diligently to support those who desire righteousness, and strictly punish those who desire perversity. He must severely correct wicked men with worldly punishment, and he must loathe and suppress robbers and plunderers and despoilers of the world's goods, and sternly resist all God's foes. And with justice he must be both merciful and austere: merciful to the good and stern to the evil."

[222] Rudolf Meissner, *Die Kenningar der Skalden, Ein Beitrag zur skaldischen Poetik* (Bonn: Schroeder, 1921), p. 362. The idea was emphasized with particular strength by Arnórr jarlaskald who addressed King Magnús Óláfsson three times in this way in a not particularly long praise poem, see his *Hrynhenda* 12 and 17 (*bis*), in Skjd. B I, 309 and 310; Diana Whaley, *The Poetry of Arnórr jarlaskáld: An Edition and Study*, Westfield Publications in Medieval Studies, vol. 8 (Turnhout: Brepols, 1998), pp. 166–68, 176–78. We cannot agree with Klaus von See's contention that such expressions solely reflected the scalds' concern with justifying systematical elimination of political opponents of the Norwegian royal power as a "war on crime", see his "Strafe im Altnordischen," *Zeitschrift für deutsches Altertum* 108 (1979) 286, 297.

[223] Theodoricus Monachus, *Historia de antiquitate regum Norwagiensium* 16, ed. Gustav Storm in MHN, p. 29. I cite the translation of David and Ian McDougall in *An Account of the Ancient History of the Norwegian Kings*, transl. David and Ian McDougall, Viking Society for Northern Research, Text series, vol. 11 (London: Viking Society for Northern Research, University College London, 1998), pp. 21–22.

[224] F i.1, ed. Storm in NgL 4: 20: "Lizt oss þat licazt til at upphafe. at log inns helga Olafs konongs stanðe efter þui sęm hann hafðe skipat. þo at þess hafe æigi her til gæt verit fyrer fę girnðar saker."

pervasive in medieval legislative rhetoric. As so many other clichés used by medieval lawgivers, it originated in the language of Roman jurisprudence. Emperor Justinian declared his intention to make a single law covering the subject, "which would renew and emend all previous [laws], and add what was lacking and cut away what was superfluous." The theme was subsequently picked up by a number of post-Roman kings who drew heavily upon the imperial model in their self-representation.[225] With the revival of royal legislation in the High Middle Ages the *topos* of "renovation" was again in full vogue. It was not only well known in Scandinavia but could even assume very elaborate forms, as in a decree against homicide that King Knut VI of Denmark issued in 1200 for Scania:

> And though it belongs to the royal power to lay down and alter laws we do not establish this law from scratch but recall it to the human memory from which it has slipped away, as one instituted since ancient times and obscured by the fogs of ignorance and by the multitude of years which are the mother of oblivion.[226]

It seems likely then that the drafters the Norwegian ordinance lifted their peculiar turn of phrase from a common stock of juristic rhetoric that was in use in the medieval West. The document they were framing was to all appearances the outcome of the Norwegian monarchy's first self-conscious attempt at sovereign lawgiving. Obviously, the situation prompted them to look for suitable models in the practice of royal chancelleries elsewhere in Europe. But it is equally clear that the same circumstance must concomitantly have led them to ponder over their words and from a multiplicity of current *topoi* to pick out the most fitting in order to communicate their message. Presumably the drafters of the ordinance expected that the gesture of "giving back" the old law that the king was making to the subjects would be readily understandable at least for the more educated part of their audience.

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[225] Justinian, Nov. 7 pr.: "Quod etiam in omni legislatione facientes credimus et in alienationibus, quae fiunt super sacris rebus, una complecti lege, quae priores omnes renovet et emendet et quod deest adiciat et quod superfluum est abscidat." Gerhard Dilcher, "Gesetzgebung als Rechtserneuerung. Eine Studie zum Selbstverständnis der mittelalterlichen Leges," in *Rechtsgeschichte als Kulturgeschichte: Festschrift für Adalbert Erler zum 70. Geburtstag*, ed. Hans-Jürgen Becker *et al*. (Aalen: Scientia, 1976), pp. 13–35, gives a very subtle analysis of the motif in the legislation of early medieval kings. On reminiscences of Justinian's Novel in Anglo-Saxon sources see Patrick Wormald, *The making of English law: King Alfred to the twelfth century*, 2 vols. (Oxford: Blackwell, 1999–2003) 1: 129, 133, 277–85, 406.

[226] *Statutum Kanuti regis de homicidio et illi contingentibus*, ed. Svend Aakjær and Erik Kroman in *Danmarks gamle landskabslove med kirkelovene*, 8 vols. (Copenhagen: Gyldendal, 1933–61) 1 : 777: "Quamuis autem regie sit potestatis leges condere vel mutare, legem hanc ex nouo non condimus, sed ab antiques temporibus constitutam et annorum multitudine, que obliuionis mater est, ignorancie nebulis obfuscatam ad humanam a qua lapsus est memoriam reuocamus." Cf. Poul Johs. Jørgensen, "Manddrabsforbrydelse i den skaanske Ret fra Valdemarstiden," in *Festskrift udgivet af Københavns Universitet i Anledning af Universitetets Aarsfest*, November 1922 (Copenhagen: Københavns Universitet, 1922), pp. 16–18, 26–27, 77–86.

Conclusion

We will now briefly summarize the overall points that have been made all along in the process of this study.

An examination of the genesis of the notion of the "laws of St Óláfr" leaves us with more open questions than certain answers. There are no reasons to believe that Óláfr Haraldsson's well-established reputation of a legislator among his contemporaries provided a natural point of departure for the subsequent growth of the legend. In other words, to explain the development of the tradition about the "laws of St Óláfr" mainly in terms of increasing fictionalisation of the historical fact would seem to oversimplify the problem.

The association of Óláfr's name with the good law of the past seem to have its origins in the time following the king's death in the battle of Stiklestad, when Norway came under the Danish rule and the new regime was determined to impose on the populace a heavier burden of public service, severer penalties for violence, and new forms of taxation. This situation could not but prompt comparisons with the good old days, with the time when Óláfr, venerated now as a saint, reigned in Norway. The subsequent abolishment of the "laws of Álfifa", as these provisions were commonly called, was presented as restoration of the legal status of the "days of St Óláfr". The latter notion quickly lost connection with its original context, and the legal order of the "days of St Óláfr", or what it was thought to have been, became a reference point with which usages and customs of the day could be compared and judged. An appeal to the "days of St Óláfr" was sometimes occasioned by a situation when instability of the established order of things was felt and the need arose to secure oneself against potential infringements on one's rights. There must have been a direct link between these references to the "days of St Óláfr" and the concomitant growth of the legendary tradition about the laws of the saint king.

The revision of *Gulaþingsbók* in the reign of Magnús Erlingsson, which resulted in the division of its contents into the "Óláfr" and the "Magnús" texts, furthered the tendency to associate all old-established law with St Óláfr's name. There is, however, no reason to think that the juxtaposition of the new laws with the old ones, attributed as they were to Óláfr, testified to the reluctance on the part of the editors of the law-book to unconditionally

acknowledge the validity of the former. The framers of *Gulaþingsbók* seemed not so much to oppose "Magnús" to "Óláfr" as to thematize continuity between the past and the present in a manner that broadly resembled Bernard of Chartres' image of the dwarfs sitting on the shoulders of giants.

The ecclesiastical literature about the saint king dating from the 1160s and 70s had a formative influence on the development of Óláfr's image as legislator. The life of the saint, *Passio Olavi*, attached much importance to the part his laws had played in establishing a right balance between different social layers, in regulating the relationships between the church and the secular society, and in imposing legal limitations on the king's power. The author built up his account of Óláfr's legislation drawing upon stock themes of contemporary European political and legal thought. Other ecclesiastical writers brought into prominence the idea that the saint king's legislation was still upheld and venerated by all good men.

By the end of the twelfth century the theme of the "laws of St Óláfr" began to play an important part in legitimising claims to the power. Sverrir utilized it in his struggle with Magnús Erlingsson and the church. He asserted that according to the "laws of St Óláfr" only a king's son could legitimately be chosen king. There are reasons to believe not only that this principle actually had nothing to do with Óláfr, but also that it had never been recognized as a binding legal norm before. This motif was further elaborated in the royal propaganda under Hákon Hákonarson and served to justify the struggle for hereditary succession to the throne.

In the late years of Hákon's reign the "laws of St Óláfr" penetrated in virtually every nook and cranny of political and legal life in Norway. They were to provide an ultimate measure of the acceptable and the equitable to king and subject. As such they were invoked in the oath the king swore at his accession and in the subjects' oath of allegiance. Finally, legal reform was presented as restoration of the "laws of St Oláfr" that had previously fallen into disregard.

Select Bibliography

Agerholt, Johan. "Gamal brevskipnad. Etterrøkjingar og utgreidingar i norsk diplomatikk." In *Meddelelser fra Det norske riksarkiv*. Vol. 3. Oslo: Feilberg & Landmark, 1929–1932. Pp. 395–813.

Bagge, Sverre. *From Gang Leader to the Lord's Anoninted: Kingship in* Sverris saga *and* Hákonar saga Hákonarsonar. The Viking Collection. Vol. 8. Odense: Odense University Press, 1996.

Bagge, Sverre. "Law and Justice in Norway in the Middle Ages: A Case Study." In *Medieval Spirituality in Scandinavia and Europe: A Collection of Essays in Honour of Tore Nyberg*. Ed. Lars Bisgaard *et al*. Odense: Odense University Press, 2001. Pp. 73–85.

Brie, Siegfried. *Die Lehre vom Gewohnheitsrecht. Eine historisch-dogmatische Untersuchung*. Breslau: Marcus, 1899.

Brynteson, William E. "Roman Law and Legislation in the Middle Ages." *Speculum* 41 (1966) 420–37.

Bull, Edvard. *Det norske folks liv og historie gjennem tidene*. Vol. 2. *Fra omkring 1000 til 1280*. Oslo: Aschehoug, 1931.

Cheyette, Fredric L. "Custom, Case Law, and Medieval 'Constitutionalism': A Re-Examination." *Political Science Quarterly* 78 (1963) 362–90.

Cheyette, Fredric L. "Suum cuique tribuere." *French Historical Studies* 6 (1970) 287–99.

Clanchy, M. T. "Remembering the Past and the Good Old Law." *History* 60 (1970) 165–76.

Dilcher, Gerhard. Review of Köbler, *Das Recht im frühen Mittelalter, Untersuchungen zu Herkunft und Inhalt frühmittelalterlicher Rechtsbegriffe im deutschen Sprachgebiet*. In ZRG GA 90 (1973) 267–73.

Ebel, Wilhelm. *Geschichte der Gesetzgebung in Deutschland*. 2nd rev. ed. Göttinger Rechtswissenschaftliche Studien. Vol. 24. Göttingen: Schwartz, 1958.

Finnur Jónsson. *Den oldnorske og oldislandske litteraturs historie*. 2nd ed. 3 vols. Copenhagen: Gad, 1920–23.

Graus, František. "Verfassungsgeschichte des Mittelalters." *Historische Zeitschrift* 243 (1983) 529–89.

Gunnes, Erik. *Kongens ære: Kongemakt og kirke i 'En tale mot biskopene'*. Oslo: Gyldendal, 1971.

Gædeken, Poul. *Retsbrudet og Reaktionen derimod i gammeldansk og germansk Ret*. Copenhagen: Gad, 1934.

Helle, Knut. "Nye og gamle synspunkter på det norske middelaldersamfunnet," *Heimen* 17 (1976–78) 507–22.

Helle, Knut. *Norge blir en stat 1130–1319*. 2nd ed. Handbok i Norges historie. Vol. 3. Bergen, Oslo, and Tromsø: Universitetsforlaget, 1974.

Helle, Knut. "Rettsoppfatninger og rettsendringer: Europa og Norge i middelalderen." In *Festskrift til Historisk institutts 40-årsjubileum 1997*. Ed. Geir Atle Ersland *et al*. Historisk institutt, Universitetet i Bergen, Skrifter. Vol. 2. Bergen: Historisk institutt, Universitetet i Bergen, 1997. Pp. 41–70.

Indrebø, Gustav. *Fagrskinna*. Avhandlinger fra Universitetets historiske seminar. Vol. 4. Kristiania: Grøndahl, 1917.

Kern, Fritz. *Gottesgnadentum und Widerstandsrecht im früheren Mittelalter. Zur Entwicklungsgeschichte der Monarchie*. Mittelalterliche Studien. Vol. 1. Pt. 2. Leipzig: Koehler, 1914.

Kern, Fritz. *Kingship and Law in the Middle Ages*. Transl. by S. B. Chrimes. Studies in Mediaeval History. Vol. 4. Oxford: Blackwell, 1939.

Kern, Fritz. "Recht und Verfassung im Mittelalter." *Historische Zeitschrift* 120 (1919) 1–79.

Köbler, Gerhard. *Das Recht im frühen Mittelalter. Untersuchungen zu Herkunft und Inhalt frühmittelalterlicher Rechtsbegriffe im deutschen Sprachgebiet*. Forschungen zur deutschen Rechtsgeschichte. Vol. 7. Cologne and Vienna: Böhlau, 1971.

Krause, Hermann. "Dauer und Vergänglichkeit im mittelalterlichen Recht." ZRG GA 75 (1958) 206–51.

Kroeschell, Karl. "Recht und Rechtsbegriff des 12. Jahrhunderts." In *Probleme des 12. Jahrhunderts*. Vorträge und Forschungen. Vol. 12. Stuttgart: Thorbecke, 1968. Pp. 309–35.

Kroeschell, Karl. "'Rechtsfindung': Die mittelalterlichen Grundlagen einer modernen Vorstellung." In *Festschrift für Hermann Heimpel zum 70. Geburtstag*. 3 vols. Veröffentlichungen des Max-Planck-Institut für Geschichte. Vol. 36. Göttingen: Vandenhoeck & Ruprecht, 1971. 3: 498–517.

Liebrecht, Johannes. "Das *gute alte Recht* in der rechtshistorischen Kritik." In *Funktion und Form: Quellen und Methodenprobleme der mittelalterlichen Rechtsgeschichte*. Ed. Karl Kroeschell und Albrecht Cordes. Schriften zur Europäischen Rechts- und Verfassungsgeschichte. Vol. 18. Berlin: Dunker & Humblot, 1996. Pp. 185–202.

Lunden, Kåre. "Hovudsynspunkt på mellomaldersamfunnet." *Heimen* 18 (1979–81) 41–53.

Lunden, Kåre. *Norge under Sverreætten 1177–1319*. Norges historie. Ed. Knut Mykland. Vol. 3. Olso: Cappelen, 1976.

Lunden, Kåre. “Rett og realitet: Rettsreglane i norsk mellomalder, på ein kulturell og sosial bakgrunn.” *Forum mediaevale* (1998:1) 1–51.

Maurer, Konrad. “Die Entstehungszeit der älteren Frostuþingslög.” In *Abhandlungen der philosophisch-philologischen Classe der königlich bayerischen Akademie der Wissenschaften*. Vol. 13. Pt. 3. Munich: Verlag der Akademie, 1875. Pp. 20–84.

Maurer, Konrad. “Die Entstehungszeit der ælteren Gulaþingslög.” In *Abhandlungen der philosophisch-philologischen Classe de königlich bayerischen Akademie der Wissenschaften*. Vol. 12, Pt. 3. Munich: Verlag der Akademie, 1871. Pp. 104–70.

Motzfeldt, U. A. *Den norske vasdragsrets historie indtil aaret 1800*. Avhandlinger utg. ved Det juridiske fakultet, Kristiania. No. 1. Kristiania: Brøgger, 1908.

Norseng, Per. “Gammel rett, ny lov – et fett?” HT 66 (1987) 62–81.

Schramm, Percy Ernst. *Herrschaftszeichen und Staatssymbolik: Beiträge zu ihrer Geschichte vom dritten bis zum sechzehnten Jahrhundert*. 3 vols. Schriften der Monumenta Germaniae historica. Vol. 13. Stuttgart: Hiersemann, 1954-1956.

Schramm, Percy Ernst. *Der König von Frankreich: Das Wesen der Monarchie vom 9. bis zum 16. Jahrhundert*. 2nd ed. Darmstadt: Wissenschaftliche Buchgesellschaft, 1960.

See, Klaus von. *Altnordische Rechtswörter. Philologische Studien zur Rechtsauffassung und Rechtsgesinnung der Germanen*. Hermaea. n.s. Vol. 16. Tübingen: Niemeyer, 1964.

Taranger, Absalon. “De norske folkelovbøker.” *Tidsskrift for Rettsvidenskap* 39 (1926) 183–211, and 41 (1928) 1–63.

Torkelsen, Edwin and Grethe Authén Blom. “Fra gammel rett til ny lov: Noen problemer knyttet til nymælers ‘gyldighet’.” HT 63 (1984) 233–86.

Trusen, Winfried. “Gutes altes Recht und *consuetudo*: Aus den Anfängen der Rechtsquellenlehre im Mittelalter.” In *Recht und Staat: Festschrift für Günther Küchenhoff zum 65. Geburtstag*. Ed. Hans Hablitzel and Michael Wollenschläger. Berlin: Duncker & Humblot, 1972. Pp. 189–204.

Ustvedt, Marianne. *Af tungu fram: Sigvat Tordssons Bergsoglisvísur som skaldisk realisme og poetisk propaganda*. Unpubl. diss. University of Oslo, 1997.

Vollrath, Hanna. “Herrschaft und Genossenschaft im Kontext frümittelalterlicher Rechtsbeziehungen.” *Historisches Jahrbuch* 102 (1982) 33–71.

Wormald, Patrick. *The making of English law: King Alfred to the twelfth century*. 2 vols. Oxford: Blackwell, 1999–2003.